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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

100 ACRES IN MARIN COUNTY, CALIFORNIA, DRAKE'S BEACH ESTATES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–17a) is reported at 468 F.2d 1261. The findings of fact and conclusions of law of the district court (App. D, *infra*, pp. 20a–31a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1972 (App. B, *infra*, p. 18a). A

timely petition for rehearing with a suggestion for rehearing *en banc* was denied on December 6, 1972 (App. C, *infra*, p. 19a). On February 28, 1973, Mr. Justice Douglas extended the time for the United States to file a petition for a writ of certiorari to and including April 20, 1973. A further extension, to and including May 5, 1973, was granted by Mr. Justice Douglas on April 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals improperly departed from this Court's decision in *Niles* v. *Cedar Point Club*, 175 U.S. 300, in affirming the district court's finding that respondent Drake's Beach Estates, Inc. held title to a certain sandspit segment under a patent from the United States despite the fact that the survey on which the patent was based excluded the segment since the surveyor found that the segment was separated from the mainland by a channel of water at ordinary high tide.

2. Whether the court of appeals erred in affirming the district court's finding, based only on a Coast Survey map designed solely for navigational purposes and directly contradicted by the plat included in the patent and the surveyor's notes, that the sandspit was not separated from the mainland by a channel of water at mean high tide at the time of the patent.

3. Whether it is proper in federal condemnation proceedings to use a "developer's residual method" of valuation which is unrelated to elements of actual fair market value.

4. Whether the rulings below permitting the jury to determine what state tideland policy had been at the time of the taking conflict with this Court's decision in *United States* v. *Reynolds*, 397 U.S. 14.

STATEMENT

The present controversy began when the United States sought to acquire a large parcel of land in Marin County, California, owned by Drake's Beach Estates, Inc. for inclusion in the Point Reyes National Seashore Project. The United States and Drake's Beach reached agreement with respect to all of the land except what is now a nearly two-mile, low-lying segment of a sandspit known as Limantour Spit. The United States contended that the segment, comprising the western two-thirds of Limantour Spit, was not included in an 1860 patent from the United States, confirming an earlier Spanish land grant, under which Drake's Beach claimed title. As part of the settlement of Drake's Beach's uncontested holdings, the United States agreed to initiate condemnation proceedings against the sandspit segment.[1]

The trial of the government's condemnation suit was bifurcated. The title issue was first tried before the district court sitting alone; the issue of the value of the sandspit segment was then tried before a jury.

On the title issue, it was undisputed that the patent, not the Spanish land grant, is controlling (see *Domin-*

[1] The institution of a condemnation proceeding is not in itself a concession that the United States does not already have title to the land which is the subject of the suit. See *United States* v. *93,970 Acres of Land*, 360 U.S. 328.

guez De Guyer v. *Banning*, 167 U.S. 723, 743), and that a patent conveys only what was surveyed. See *Niles* v. *Cedar Point Club*, 175 U.S. 300, 306, 308; *Horne* v. *Smith*, 159 U.S. 40, 44–46. The dispute in the district court thus centered on what land was included in the survey incorporated into the patent.

The evidence before the district court included the patent, the plat attached to the patent showing the results of the survey, the surveyor's notes, and a United States Coast Survey map of 1859–1860. The district court found that the patent was intended to convey all of Limantour Spit to the line of ordinary high tide (App. D, *infra*, p. 22a). The court also found that the courses and distances in the patent describing the outer perimeter of Limantour Spit "meandered"[2] the shores of the surrounding bodies of water (*ibid.*). Of controlling importance here, the court further found, based on the patent, the plat, and the surveyor's notes, that the sandspit segment in issue "was not surveyed nor included in the patent" since the surveyor had found that the segment was separated from the land surveyed by a channel of water at ordinary high tide (*id.* at 22a–23a).

Despite its express finding that the surveyor had found the sandspit segment separated by a channel of water at ordinary high tide as determined by him and had limited his survey accordingly, the district court

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[2] A "meander" line is only an approximation of the actual shoreline at mean high tide. *Shively* v. *Bowlby*, 152 U.S. 1, 13, 26–29. As a general rule, the actual shoreline at mean high tide is controlling since that is the line the surveyor was attempting to approximate. *Hardin* v. *Jordan*, 140 U.S. 371, 380–381, 399–400; *Producer's Oil Co.* v. *Hanzen*, 238 U.S. 325, 339.

further found that the traverse line of the survey along what the surveyor had found to be a channel was a "meander line purporting to meander the shore line or line of ordinary high tide" of the waters surrounding Limantour Spit (*id.* at 23a). Thus, in the court's view, if in fact the surveyor was wrong and the over one-mile long sandspit in issue here was not separated from the mainland by water at ordinary high tide at the time of the survey, then the entire spit was included in the patent.

The district court then found as a fact, based on the 1859–1860 United States Coast Survey map, that at ordinary high tide at the time of the survey and patent there was no channel as found by the surveyor and Limantour Spit extended one and one-third miles westerly of the traverse line shown on the survey (*ibid.*). On this issue, the United States argued (Title Tr. 166, *et seq.*),[3] as a witness for Drake's Beach conceded at trial (Value Tr. 932–935, 1062), that Coast Survey maps were produced for navigational purposes and could not be relied upon to show exact elevations of low-lying sandspits. Despite the fact that the record included the plat, the surveyor's notes[4] and a contemporaneous survey of adjacent land by another surveyor referring, for landmark purposes,

[3] "Title Tr." refers to the transcript at the trial on the title issue; "Value Tr." refers to the transcript at the trial on the valuation issues.

[4] The surveyor's notes disclosed that, by coincidence, the surveyor had surveyed the end of the sandspit, as found by him, at a time when the water level—as determined by the relevant tide tables—corresponded very nearly with mean high tide (Plaintiff's Ex. 3; Title Tr. 58, 371).

to the sandspit segment at issue here as two islands (Plaintiff's Exs. 62–64), the district court concluded that "[t]here is no evidence that at the time of the survey or patent islands of land surrounded by water at mean high tide existed in the area of Limantour Spit or that a channel of water at mean high tide existed at or near the traverse line" (App. D, *infra*, p. 24a).[5]

In the separate trial of the valuation issues before a jury, the district court permitted Drake's Beach, over the government's objection (Value Tr. 129–130, 5126–5127), to introduce testimony based on the "developer's residual method" of valuation. Under this method, witnesses testify to the market price of finished lots based on prices of other finished lots in the area. The estimated costs of converting the unimproved land into finished lots and an assumed profit margin for the developer are then subtracted from the market price of the finished lots to arrive at the "market value" of the undeveloped land.

The United States also unsuccessfully objected to the submission to the jury of the contention of Drake's Beach that the value of its land was enhanced by the fact that Drake's Beach would be able to obtain fill from adjoining state wetlands and exchange part of its land for state wetlands to facilitate the subdivision

[5] Both the government and Drake's Beach offered inconclusive expert testimony on the probable condition of the sandspit at the time the survey was made. The condition had been altered by an earthquake in 1906. Apart from this testimony, the question whether the sandspit was in fact one or more islands at the time of the survey turns solely on documentary evidence.

of its land. The supposed availability of the state lands, which included clam and oyster preserves, was based on the testimony of a minor state official. In objecting to this testimony, the United States argued (Value Tr. 1359, 1579–1591, 3560–3575) that the federal government and the State, at the time of the taking, had parallel policies of preserving the Point Reyes area and that the anticipated availability of state lands to Drake's Beach was thus unfounded; the State appeared at the trial and objected to the testimony (Value Tr. 1582, 1589, 1937, *et seq.*), and filed an *amicus* brief in the court of appeals supporting the United States on this issue.

On appeal, the court of appeals affirmed the judgment of the district court on both the title and valuation issues (App. A, *infra*, pp. 1a–17a).[6] With respect to the title issue, the court rejected the government's contention that under *Niles* v. *Cedar Point Club*, 175 U.S. 300, and other cases the traverse along the channel found by the surveyor and reflected in the plat and patent excluded the disputed sandspit segment from the patent (*id.* at 4a, n. 1); the court accepted without analysis the district court's finding that the sandspit segment was not in fact separated from the mainland by water at mean high tide at the time of the survey

[6] Drake's Beach filed a cross-appeal from the district court's denial of motions for litigation expenses and interest on the judgment at a rate in excess of the six percent allowed by the court. The court of appeals affirmed the district court's judgment on these matters as well (App. A, *infra*, pp. 13a–17a). Drake's Beach has filed a petition for a writ of certiorari on these issues. No. 72–1201.

(*id.* at 5a–6a). With respect to the valuation issues, the court of appeals upheld the admission of testimony based on the developer's residual method of valuation and on the possible availability of adjoining state wetlands (*id.* at 6a–13a).

REASONS FOR GRANTING THE WRIT

This case raises important issues affecting the validity of title claims to wetlands and lowlands based on government patents.[7] These issues are of growing significance in light of the widespread current interest in preserving wetlands. The rulings below represent a substantial departure from this Court's holding in *Niles* v. *Cedar Point Club*, 175 U.S. 300, that a government patent is limited to the land actually surveyed. This case also presents a recurring question concerning the propriety of the use of testimony based on the highly speculative developer's residual method of valuation. The decision below conflicts with the approach of other courts of appeals in determining whether and in what circumstances such testimony should be used. Accordingly, review by this Court is warranted.

1. In *Producer's Oil Co.* v. *Hanzen*, 238 U.S. 325, 339, this Court summarized the law concerning the relationship of meander lines to federal conveyances as follows:

> * * * [I]n general meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent refer-

[7] State titles to wetlands based on the Swamp Land Act, 43 U.S.C. 982–984, are also affected by the decision below.

> ring to an official plat which shows the same bordering on a navigable river the purchaser takes title up to the water line. But * * * facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines these must be treated as definite boundaries. * * *

One of the cases cited by the Court (238 U.S. at 338) for the latter proposition was *Niles* v. *Cedar Point Club*, *supra*. In *Niles*, the controversy centered on whether certain marsh lands bordering Lake Erie were included in a patent to lands adjacent to the marsh; the surveyor had meandered a line at the edge of the marsh. 175 U.S. at 306. Based on the surveyor's notes, the Court concluded that the surveyor had stopped his survey at the marsh, without entering it, and that by issuing a patent based on the survey the government had not intended to convey the marsh along with the adjacent lands. The Court noted (*ibid.*): "It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections."

In our view, *Niles* is controlling here. The district court expressly found that the surveyor stopped his survey of Limantour Spit at a channel he found to exist at ordinary high water (see p. 4, *supra*). Whether or not a channel actually existed at the time of the survey at mean high water, the surveyor meandered a line (the traverse line in issue) along that channel—a line intended to approximate the edge of the channel, not the high water line one and one-third

miles further down the sandspit. Under *Niles*, this intentional limitation of the survey, even if predicated on a faulty factual premise, limits the grant contained in the patent. Drake's Beach thus did not have title to the sandspit segment in issue.

Even if it were assumed *arguendo* that the actual mean high water line at the time of the survey—rather than the high water line as perceived by the surveyor—governs, the courts below erred in finding on the basis of the Coast Survey map that the sandspit segment was part of Limantour Spit at the time of the survey. It is true that this Court does not usually review findings concurred in by two lower courts; the finding in issue here, however, rests on documentary evidence, and the court of appeals undertook no independent analysis of the facts on this issue. Moreover, the propriety of reliance on maps drawn solely for navigational purposes in title disputes concerning coastal lands is a recurring question which should be resolved by this Court.[8] Certainly, the Coast Survey map should not be relied on when contradicted, as here, by substantial, contemporaneous documentary evidence directly pertinent to the title issue.

2. The court of appeals' approval here of the highly speculative developer's residual method of valuation contrasts with the specific disapproval of that method

[8] A private claimant to lowlands has the burden of proof in establishing title to the lands. *Whitney* v. *United States*, 167 U.S. 529, 548; *United States* v. *Gossett*, 416 F. 2d 565, 568 (C.A. 9), certiorari denied, 397 U.S. 961. In our view, a claimant in a case such as this one does not satisfy that burden simply by producing a Coast Survey map in support of his claim.

(to establish the value of land as part of the defense in a criminal case) in *United States* v. *Hickey*, 360 F. 2d 127, 137 (C.A. 7), certiorari denied, 385 U.S. 928. The developer's residual method is designed to show the *highest* price a developer can pay for undeveloped land and still make a reasonable profit, rather than what a developer would *actually* pay. The valuations arrived at by this method are free of the give-and-take of the market and thus are not sufficiently related to the market value standard set forth in *United States* v. *Miller*, 317 U.S. 369, 374, and recently reaffirmed in *Almota Farmers Elevator & Warehouse Co.* v. *United States*, No. 71–951, decided January 16, 1973, slip op., p. 4.

In contrast to the decision below, those courts of appeals which have considered the use of valuation techniques dependent upon the development of land for minerals have emphasized the importance of relating the elements of valuation to market factors. See *United States* v. *Whitehurst*, 337 F. 2d 765, 772–776 (C.A. 4); *United States* v. *158.76 Acres of Land in the Town of Townshend, Vt.* (*Jacques*), 298 F. 2d 559, 561 (C.A. 2); *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 406–407 (C.A. 5), certiorari denied, 366 U.S. 944. In the present case, there was no proof that the developer's residual technique was an accepted method of valuation used as the basis for land transactions in the areas of California where the land in issue is located. The uncritical use of highly speculative valuation techniques in condemnation proceedings might well significantly and unduly affect the

condemnation process. The spread between owner and government valuations in all likelihood would increase as owners and their appraisers anticipate the availability of speculative valuation techniques should the matter go to trial; as a result, the present practice whereby the vast majority of federal eminent domain cases are settled could be severely disrupted.

3. Finally, the courts below erred in permitting the jury to decide whether Drake's Beach would have been able to obtain fill from adjacent state lands or exchange lands with the State. The question of what state policy was prior to the federal project on the use of state wetlands [9] was a collateral matter to be determined by the trial judge. Not until the court determined that state policy permitted the use of the wetlands would it be proper for the jury to consider the availability of state wetlands on the issue of "just compensation"—the sole issue to be decided by the jury under Rule 71A(h) of the Federal Rules of Civil Procedure. This Court in *United States* v. *Reynolds*, 397 U.S. 14, 19–20, emphasized the narrowness of the "just compensation" issue to be decided by the jury and specified that it is the obligation of the district judge to decide all other matters in condemnation cases.

[9] As the State argued in its brief *amicus curiae* in the court of appeals, state policy prior to the initiation of the federal project prohibited the use of wetlands in the manner contemplated by Drake's Beach. See *Strand Improvement Co.* v. *City of Long Beach*, 173 Cal. 765, 770–773, 161 Pac. 975, 977–978; *City of Long Beach* v. *Mansell*, 3 Cal. 3d 462, 480, 476 P.2d 423, 436; *Marks* v. *Whitney*, 6 Cal. 3d 251, 259–260, 491 P.2d 374, 380.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
SAMUEL HUNTINGTON,
Assistant to the Solicitor General.
RAYMOND N. ZAGONE,
CARL STRASS,
Attorneys.

MAY 1973.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

Nos. 26,483 and 26,531

UNITED STATES OF AMERICA, APPELLANT, CROSS-APPELLEE, *vs.* 100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., A CORPORATION, ET AL., APPELLEES, CROSS-APPELLANTS

[September 25, 1972]

Appeals from the United States District Court for the Northern District of California

Before: BROWNING and WRIGHT, *Circuit Judges,* and TAYLOR,* *District Judge.*

TAYLOR, *District Judge:* This is a condemnation action involving a small peninsula of sandy real estate on the coast of Marin County, California, commonly known as Limantour Spit, some 45 miles north of the city of San Francisco on the Pacific Coast. Appellee (Drake's Beach) claims title through a patent of the United States to Andrew Randall issued June 4, 1860. The Government contends that the land in question was not included in the patent. These proceedings had their inception when the United States purchased from Drake's Beach some 850 acres adjacent to this parcel of land for the Point Reyes National Seashore

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

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Project. As a part of that purchase agreement the United States agreed to institute this condemnation proceeding against the parcel in question which the United States claimed it owned. Pursuant to the condemnation proceedings, the parcel of land was taken by the Government on October 23, 1963.

The trial of the issues were bifurcated, the issue as to title was tried to the court, without a jury, and subsequent to the court's finding title in Drake's Beach, the issue of just compensation for the taking was tried to the court and a jury which lasted about 12 weeks. The jury returned a verdict for $700,000 as the just compensation which was considerably more than the Government's evidence of value and substantially less than what Drake's Beach contended it should have as just compensation.

The final judgment was entered on May 7, 1970, from which the Government appealed and Drake's Beach cross-appealed. The principal issues presented by the Government on its appeal relate to the question of title to the property being condemned and the admissibility of the evidence introduced on behalf of Drake's Beach in determining market value of the property taken. The issues raised by Drake's Beach by its cross-appeal relate to the denial of its motion for interest at the prevailing rate rather than the 6% awarded in the judgment; the denial of Drake's Beach's motion for just compensation to include expenses and disbursements necessarily incurred in defending its title, surveying and determining the size and dimensions of the land taken and establishing value; and the refusal of the trial court to promptly order an increase of the deposit from $1.00 to the amount of the judgment plus interest.

We shall first consider the issue raised in regard to title and ownership of the property condemned.

The Government concedes that Drake's Beach is the successor in interest of the patentee, Andrew Randall, and that the shore line (mean high tide line) of Tomales Bay, the Pacific Ocean and Limantour Bay constituted the northerly and westerly boundaries of the land patented. The patent was issued pursuant to a decree confirming a Mexican grant to one Antonio Maria Osio. This decree is incorporated in the patent and recites that the land title is the same as that formerly granted to Osio and is bounded on one side by the Estero of Tomales, on two sides by the Pacific Ocean, and on the fourth side by land known as the Ranches of James Richard Perry and Rafel Garcia.

Following the decree of confirmation on December 28, 1857, a survey was made of the land confirmed. The surveyor ran a meander line along the shores of Tomales Bay, Limantour Bay and the Pacific Ocean. A description of the land in accordance with this survey is included in the patent and a plat thereof attached to the patent. When the surveyor reached a point part way up the Limantour Bay side of the Spit, he made a traverse "S.17-1/2° W. 4.50 to the mouth of Limantour's Bay. Thence along the rocky coast of the Pacific Ocean." This line has been referred to in these proceedings as "the 415 line". The effect of this course No. 415 was that the balance of the Spit lay outside the traverse lines constituting the courses and distances of the meander line and this is what gave rise to this controversy.

On this appeal the Government concedes that the lines drawn by the surveyor were meander lines along the shores of Limantour Bay and the Pacific Ocean and that under well established principles, the actual shore line and not the traverse lines of the survey con-

stitutes the boundary of the land patented.[1] *Hardin v. Jordan*, 140 U.S. 371, 35 L.Ed. 423, 11 S.Ct. 808 (1891); *Thomas R. Bishop Co. v. Santa Barbara County*, 96 Fed. 2d 198 (9th Cir. 1938), cert. den. 305 U.S. 623 (1938).

The Government concedes that if the portion of the Spit in question was at the time of the survey and patent a continuation of the peninsula lying above mean high tide, then Drake's Beach owns it, but if below mean high tide, then it was an island and not within the survey and patent.

In regard to the question of title to that portion of the Spit, the only issue to be resolved by this court is whether the findings of the trial court are supported by the evidence. The trial court found as follows:

> "10. The ordinary high tide lines of Limantour Bay and the Pacific Ocean as they existed at the time of the survey and patent forming the

[1] The Government says "It is undisputed that the actual mean high tide line is the boundary if there were a difference between the survey meander line and the actual mean high tide line". At the same time, however, the Government cites certain cases for the rule that an erroneous meander line is effective to limit the scope of the land granted. The cases in this area were dispositively reviewed by the Supreme Court in *Producer's Oil Co. v. Hanzen*, 238 U.S. 325 (1915) (see authorities collected, *id.* at 338–39). The Court held that its prior cases established that a meander line does not delimit a grant where the land is bordered by water *unless* special evidence is presented to show an intent to use the meandar line as a boundary of the patented land. *Id.* at 339. Accord, *Thomas R. Bishop Co. v. Santa Barbara County*, 96 F.2d 198, 202 (9th Cir. 1938), cert. denied 305 U.S. 623 (1938). Both *Horne v. Smith*, 159 U.S. 40 (1895) and *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), cited by the Government, are "special facts" cases. See *Horne*, supra, 159 U.S. at 43–46 ("obvious" that survey not intended to cover the disputed parcel), and *Niles*, supra, 159 U.S. at 306–09 (meander line intended to serve as boundary line of fractional shares in the grant). The present case does not involve a special intent to limit the survey.

boundaries of Limantour Spit are depicted on the U.S. Coast Survey Map between Duxbury Reef and Rancho Punta de los Reyes, 1859–60, Register 805 (Plaintiff's Exhibit 28) and on U.S. Coast Survey Map entitled 'Preliminary Chart of Drake's Bay, California' dated 1860 (Plaintiff's Exhibit 29), and at the time of the survey and patent Limantour Spit extended above ordinary high tide for approximately one and one-third miles westerly of the traverse line between Stations 415 and 416 as said line is shown by said survey."

"11. The location of the mouth of Limantour Bay at the time of the survey and patent is depicted on said U.S. Coast Survey Map dated 1859–60 (Plaintiff's Exhibit 28) and on said 'Preliminary Chart of Drake's Bay' dated 1860 (Plaintiff's Exhibit 29) and was in fact approximately one and one-third miles westerly of the traverse line between stations number 415 and 416 in the survey and lay opposite the middle bluff of Drake's Head."

"12. There is no evidence that at the time of the survey or patent islands of land surrounded by water at mean high tide existed in the area of Limantour Spit or that a channel of water at mean high tide existed at or near the traverse line between stations numbered 415 and 416 on the survey."

"13. At the time of the issuance of the patent to Andrew Randall, Limantour Spit, of which the property involved in this action was a part, was a long narrow peninsula extending westerly from the upland and lying above mean high tide for its entire length."

In determining the question of title to the parcel of land in question, the crucial issue before the court is whether the low lying Limantour Spit was above the mean high tide line in 1858, the time of the survey on which the patent was based. It appears to be the

Government's theory that in 1858, although Limantour Spit may have existed at low tide, it was only two islands at mean high tide and therefore the patent only granted to Randall the land to the seashore and the islands remained the property of the United States. Drake's Beach contends, and the trial court found, that the entire spit existed above the mean high tide line in 1858.

We have carefully considered the evidence in the record on which the respective parties rely, both documentary and otherwise, in regard to the title issue and believe there is ample evidence to support the findings and conclusions of the trial court on this issue. Certainly the findings and conclusions are not clearly erroneous.

Having resolved the question of title, we now turn to the evidentiary issues raised by the Government. The precise questions presented here are whether the trial court abused its discretion in allowing Drake's Beach to introduce evidence of lot sales and development costs in support of its "developer's residual approach" theory for the purpose of determining the fair market value of the property taken; and whether the court erred when it admitted evidence as to probabilities of integrated use of the condemned land with state-owned tidelands.

This court in *United States* v. *55.22 Acres of Land, etc., Yakima Co., Wash.*, 411 F.2d 432, 434 (9th Cir. 1969) announced the rule in regard to the admissibility of evidence as follows:

> "The determination of that question [referring to the admissibility of evidence] calls for an exercise of a sound discretion by the trial court, and the ruling thereon is reviewable only for abuse of discretion."

In a condemnation proceeding, such as we have here, the desired result is to see that the landowner is put in as good a position pecuniarily as he would have occupied if his property had not been taken. *Seaboard Airline Ry. Co.* v. *United States,* 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923). The Supreme Court of the United States has laid down broad guidelines for the purpose of achieving this desired result. In *United States* v. *Miller,* 317 U.S. 369, 373, 374, 63 S.Ct. 276, 87 L.Ed. 336 (1943), the Court stated:

> "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the . . . 'fair market value' of what is taken."

The three generally recognized approaches in ascertaining "fair market value" are: (1) Comparable sales; (2) the income or capitalization of income; and (3) the reproduction cost at the time of taking, less depreciation. See *United States* v. *Toronto, Hamilton and Buffalo Nav. Co.,* 338 U.S. 396, 402, 403, 70 S.Ct. 207, 94 L.Ed. 195 (1949).

Ordinarily, if there are sales of comparable property at or near the time the condemned property is taken, evidence in regard to such sales would be more appropriate than any other method in determining the market value of the property taken. However, if there are no comparable sales, then other methods must be resorted to in order to ascertain market value. In order for the sales of other property to be admissible and relevant, that property must be in fact comparable. See *Fairfield Gardens, Inc.* v. *United States,* 306 F.2d 167, 172 (9th Cir. 1962).

The land or sandspit, the subject of this action, was a portion of some 1000 acres of property owned by Drake's Beach. Easterly of the subject property was another 100 acres of the same sandspit which had been acquired by the Government as part of an earlier settlement. The property in question was part of a recreational and residential development in progress on the entire acreage. Development of the condemned property was imminent. Indeed, some preparatory physical work had already been completed.

At trial, Drake's Beach, through its expert appraiser witnesses, asserted that the highest and best use of the subject property was for subdividing into recreational beach lots, while the Government, through its appraisers, maintained that the highest and best use of the property was for recreational purposes only. It is not uncommon for expert witnesses to disagree in regard to the highest and best use to which condemned property may be put and as to values based on their respective opinions. Ultimately, this is a question to be decided by the trier of fact, in this case the jury, from the evidence. It appears obvious that the jury in this case agreed with the landowner. It is basic, not disputed by the Government here, that in an eminent domain proceeding the landowner is entitled to a value based on the use to which the condemned property is being put or may be put in the reasonably near future. *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *McCandless v. United States*, 298 U.S. 342, 345, 56 S.Ct. 764, 80 L.Ed. 1205 (1936).

The expert witnesses for Drake's Beach testified as to the fair market value of the condemned property to be $1,600,000 and $1,995,000 and the Government's witnesses valued the land at $171,000 and $185,000.

In arriving at their values, the owner's witnesses took into consideration the market data of sales of adjacent subdivided lots and made deductions for selling and advertising expenses, engineering and development costs, overhead costs, taxes, buyers' anticipated profits, and for acreage loss for streets, etc. in order to reflect or indicate the value of the property at the time of taking. In this case, the data relied on was derived from the market and facts as had been generated in the development of adjacent land. This method is referred to as the "developer's residual approach".

The Government's values were based on what its witnesses considered comparable sales. The record does not show that the sales relied on were in fact comparable in regard to location, character and desirability for subdividing as recreational property. It is apparent that the jury was not impressed.

The Government strenuously objected to the owner's method of arriving at the fair market value of the condemned property and argues here that the trial court erred in admitting such evidence. It is claimed that the method is speculative in the extreme and has no relation to the market because it does not consider the seller or competing investment opportunities. We do not agree. The evidence admitted was based on facts obtained as a result of the subdivision of which the condemned property was a part and partially under development at the time it was taken. Even though the subject property was largely unimproved, it was an integral part of a subdivision being developed and was the next unit to be completed. It did not exist as a separate parcel prior to the commencement of the condemnation action. The record clearly indicates that the subject property was unusual in character in that it was a sandspit sur-

rounded on three sides by water and had good potential for development as beach homesites.

It is fundamental that Drake's Beach is entitled to just compensation for the subject property and this requires that it be placed in "as good a position pecuniarily" as it would have occupied if its property had not been taken. See *U.S. v. Miller*, supra; *Seaboard Airline Ry. Co. v. U.S.*, supra.

This court enunciated the rule in *U.S. v. 55.22 Acres*, supra, that various appraisal methods are admissible for determining just compensation or market value. All facts which would influence a person of ordinary prudence, desiring to purchase the property, are admissible. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949). The modern trend favors a broad rule of admissibility, with discretion in the trial court. *United States v. 25.406 Acres of Land, et al.*, 172 F.2d 990, 993 (4th Cir. 1949), cert. denied 337 U.S. 931 (1949); and any evidence is admissible which might reasonably influence a willing seller and a willing buyer. *Wolff v. Commonwealth of Puerto Rico*, 341 F.2d 945, 947, 948 (1st Cir. 1965).

It is fair to say that the valuation trial was unusual, not only as to the characteristics of the subject property, but also in regard to the volume of evidence produced and time consumed in presenting it to the jury. Each party was given every opportunity to present evidence on its theory as to value and to counter or refute the evidence and theory of the other. After carefully reviewing the record and prevailing authorities, we conclude that the trial court did not abuse its discretion in admitting the evidence of appellee, Drake's Beach, on the question of fair market value. The trial court correctly instructed the jury during the trial that the amount to be awarded was

the fair market value of the property as it was on October 23, 1963, the date it was taken by the Government.

In performing this difficult task, the jury was entitled to and apparently did take into consideration all the evidence introduced by the respective parties in arriving at its verdict.

The remaining evidentiary question raised by the Government is that the trial court erred in permitting Drake's Beach to present testimony as to the reasonable probability that adjoining state-owned tidelands would have been available in connection with the development of the subject property. One probable use was to straighten the common boundary line and the other was to provide a source of land fill for the condemned property while dredging of the State's channels for recreational boatways. At trial, the Government objected to the introduction of this evidence and to the court's charge permitting the approach.

Drake's Beach contends that this evidence of reasonable probabilities was admissible on several grounds: (1) Relevant to market value as a factor an informed buyer and seller would consider; (2) relevant to adaptability of the property to its highest and best use; and (3) relevant to the feasibility of such use. The Government argues that in a federal eminent domain proceeding, a condemnee cannot assume assemblage with lands of another sovereign whose policy parallels the federal one and prohibits the contemplated use. In this connection, the Government argues that the State lands were held for a purpose parallel to the federal purpose, which was a park to preserve its natural attributes; that the State lands were in or adjoined clam and oyster preserves and therefore involved State policy on ecology; and that the State fully supported the federal purpose and had objected in the past to

just the kind of use proposed for these particular State holdings because such use would adversely affect the ecology of the clams and oysters.

It appears to be well settled that in determining market value of condemned property, evidence as to the reasonable probabilities of its use is admissible and may be considered. See *McCandless v. U.S.*, supra; *United States v. Waterhouse*, 132 F.2d 699 (9th Cir. 1943), aff'd. 321 U.S. 743, 64 S.Ct. 484, 88 L.Ed. 1047 (1944). The weight to be given evidence of reasonable probability is a question for the trier of fact. Cf. *Olson v. U.S.*, supra. Evidence in regard to prospective uses is admissible and whether adaptability and probability affect market value is for the jury, *U.S. v. Waterhouse*, supra.

The argument of the Government on this question seems to be based on what the State's policy was subsequent to the initiation of the Government's project, while the evidence was introduced to show probabilities that may have been prior thereto. It is fundamental that the effects of a project, which requires the taking of property, must be disregarded in determining the fair market value of the property prior to the taking. See *Olson v. United States*, supra; *New York v. Sage*, 239 U.S. 57, 36 S.Ct. 25, 60 L.Ed. 43 (1915). This evidence was introduced by Drake's Beach through witnesses who expressed their opinion and the facts and reasons on which such opinions were based. The Government had ample opportunity to cross-examine these witnesses and to discredit or contradict the testimony of Mr. Mady and others. The trial court, in its discretion, properly decided the witnesses were competent to testify and apparently found that a sufficient foundation had been shown for such testimony. The weight to be given such opinion evidence in the circumstances was for the jury.

The competency of an expert witness is a matter for the trial judge in the exercise of discretion. In *St. Joe Paper Co. v. United States,* 155 F.2d 93 (5th Cir. 1946), at page 96, the court stated:

> "The qualifications required of an expert before he may give an opinion is a question for the trial judge and his decision thereon is conclusive, unless clearly erroneous as a matter of law."

We conclude that the admission by the trial court of the evidence complained of by the Government does not constitute reversible error.

CROSS-APPEAL

In November 28, 1969, the jury rendered its verdict in favor of Drake's Beach for the sum of $700,000 as the just compensation for the condemned land. Thereafter, Drake's Beach moved the trial court to award interest at the prevailing economic rate; for additional compensation by way of litigation expenses and disbursements in excess of $150,501.88; and to increase the security deposit and for payment of the same. The motions were denied and Drake's Beach cross-appealed, limiting its appeal to the denial of its motions.

Drake's Beach contends that the Fifth Amendment to the Constitution and the decisions of the Supreme Court of the United States require that the landowner in a federal eminent domain proceeding be fully compensated for his losses and that an additional element of his loss is the right to a reasonable rate of interest for the delay in payment. Drake's Beach argues that the allowance of six percent interest, as authorized by 40 U.S.C. § 258a and as provided in the judgment, is not a reasonable rate of interest because it was not the current prevailing economic rate and therefore would not fully compensate Drake's Beach for its loss.

The question of a rate of interest higher than the six percent authorized by 40 U.S.C. § 258a was initially raised by Drake's Beach in the form of a lodged Judgment, requesting that the interest be computed at the prevailing economic rate. The Government opposed awarding interest at a rate in excess of that provided by statute. The trial court denied the motion of Drake's Beach as to interest, but stated that it would have provided a rate of seven percent but for the statute requiring six percent.

In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327, 13 S.Ct. 622, 37 L.Ed. 463 (1893), it is clearly stated that the determination of just compensation is a judicial question:

> "... this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

United States v. Miller, supra, teaches that a landowner is to be made whole for his losses resulting from the government's taking of his property. In *Seaboard Airline Ry. Co. v. United States*, supra, the Supreme Court stated at page 306:

> "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. *Where the United States condemns and takes possession of*

> *land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.*" [emphasis added]

It is evident from the language used in 40 U.S.C. § 258a that interest is intended to be a part of just compensation:

> ". . . said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the *said judgment shall include, as a part of the just compensation awarded, interest* at the rate of 6 per centum per annum . . ." [emphasis added]

This court is of the opinion that interest, at a proper and reasonable rate, is an element of the just compensation to be determined in the judicial process. Since we believe interest is an element of just compensation, we must consider whether interest is a question of law to be decided by the court, or if it is a question of fact to be determined by the trier of fact. In a complex capitalist society such as ours, a determination as to what is a proper rate of interest has many variables based on economic and business considerations which may vary within each factual situation. It seems clear that a determination as to the proper rate of interest is a factual question and should be determined by the trier of fact.

The record in the present case conclusively shows that Drake's Beach did not attempt to introduce any evidence in regard to interest during the valuation trial. It was not until after the jury had found just compensation that Drake's Beach raised the issue of interest. In *Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458 (1971) the United

States Court of Claims was presented with a similar problem. The case was originally tried before a Commissioner and although the claim for a higher rate of interest was presented to the Commissioner, there was no attempt to present evidence in support of the claim until it was presented to the United States Court of Claims. The court, in discussing the question of interest, stated at page 460:

> "We think that an issue of this character should have been threshed out at the trial, where both sides could have introduced evidence (and possibly expert testimony, subject to cross-examination) and an adequate record made for the court's guidance..."

The quoted rationale is equally appropriate in the case here. In the above cited case, a commissioner made the determination of just compensation, while in this case the determination was made by the jury. Drake's Beach should have made the interest question an issue at trial instead of waiting until after the just compensation question had been decided by the jury. Drake's Beach had its day in court to prove just compensation and to present all its evidence affecting that determination. It is not entitled to another trial to prove additional elements of just compensation which it could have presented during the original trial.

Drake's Beach further contends that the trial court should have also awarded, as just compensation, its expenses and disbursements incurred in this litigation. This question was also raised subsequent to the jury verdict. We believe this question was resolved in *Dohany v. Rogers*, 281 U.S. 362, 368, 50 S.Ct. 299, 74 L.Ed. 904 (1930), wherein it is stated:

> "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."

Without reliance on *Dohany,* we do not consider it necessary to discuss the merits of this contention since the record reveals that there was no attempt to present evidence to the jury in regard to litigation expenses. If, as Drake's Beach contends, litigation expenses are a part of the just compensation to be awarded, it follows that evidence in regard to such expenses should have been presented to the trier of fact.

The final question raised on this cross-appeal is now moot since this court has heretofore ordered the Government to make an adequate deposit and for the withdrawal of the same by Drake's Beach.

The judgment made and entered in this cause is AFFIRMED.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

Nos. 26483 and 26531

UNITED STATES OF AMERICA, APPELLANT, CROSS-APPELLEE, *vs.* 100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., A CORPORATION, ET AL., APPELLEES, CROSS-APPELLANTS

(D.C. #41861 Civ)

APPEAL from the United States District Court for the Northern District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Filed and entered September 25, 1972)

APPENDIX C

United States Court of Appeals for the Ninth Circuit

No. 26,483
No. 26,531

UNITED STATES OF AMERICA, APPELLANT-CROSS-APPELLEE, *vs.* 100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., A CORPORATION, ET AL., APPELLEES-CROSS-APPELLANTS

[Filed December 6, 1972]

ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and TAYLOR* District Judge

The panel as constituted in the case above has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated, December 6, 1972.

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*Honorable Fred M. Taylor, Senior Judge, United States District Court, District of Idaho, sitting by designation.

APPENDIX D

In the United States District Court in and for the Northern District of California Southern Division

Civil No. 41861

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* 100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., A CORPORATION, ETC., ET AL., DEFENDANTS

JUDGMENT

The above-entitled action as to the issue of title came on regularly for trial on October 18, 1965, before the Court, the Honorable Lloyd H. Burke sitting without a jury. The Court heard the testimony and examined the proofs offered by the respective parties. The cause having been submitted for decision, and the Court having been fully advised in the premises on June 29, 1966, rendered its decision as to title and awarded the same to defendant, Drake's Beach Estates, Inc.

In the trial of the cause as to title, there appeared as counsel for plaintiff Assistant United States Attorney Rodney H. Hamblin, and there appeared as counsel for defendant, Drake's Beach Estates, Inc., Landels, Ripley, Gregory and Diamond by Edward D. Landels and Jackson and Adams by Jess S. Jackson, Jr.

As to the issue of valuation, the above-entitled action came on for trial on September 8, 1969, the Honorable Lloyd H. Burke presiding before a jury

empaneled and sworn for the determination of just compensation to be paid for the taking of the estate and interest in the property hereinafter described.

In the trial of the cause to determine just compensation there appeared as counsel for plaintiff Assistant United States Attorney Rodney H. Hamblin, and there appeared as counsel for defendants Jess S. Jackson, Jr. and Robert S. Webber.

In the jury trial to determine just compensation only the defendant Drake's Beach Estates, Inc., appeared and no other person or entity appeared in Court to claim an interest in or to the compensation payable for the property taken.

After hearing the evidence, both oral and documentary, the arguments of counsel, and upon being fully instructed by the Court, the jury retired to consider its verdict, and on November 28, 1969, returned the following verdict:

> "We, the jury, find that just compensation for the land condemned on October 23, 1963, is: $700,000.00.
>
> /s/ Miss Marcelle Bailey,
> *Foreman.*"

Predicated upon the pleadings and documents on file in this action, the evidence introduced at the trials, and the verdict of the jury, the Court is now fully informed and finds and concludes as follows:

Court Trial as to Title

Findings of Fact

It is true that:

1. The property being taken in this action and title to which is determined herein is described in plaintiff's complaint and declaration of taking.

2. Pursuant to the Act of March 3, 1851 (9 Stat. 631), the United States of America issued a patent to Andrew Randall, dated June 4, 1860, known as Rancho Punta de los Reyes Sobrante.

3. Defendant, Drake's Beach Estates, Inc., at the date of the commencement of this action was the successor in interest of Andrew Randall and by mesne conveyances had acquired all title and interest in the land granted to Andrew Randall by the United States.

4. In the patent issued to Andrew Randall the courses, distances and angles of the traverse lines of the perimeter description on the north, west and south of the land patented meandered the shores of Tomales Bay, the Pacific Ocean, Drake's Bay and Limantour Bay.

5. The shores of Tomales Bay, the Pacific Ocean, Drake's Bay, Limantour Bay and the Pacific Ocean, respectively constituted the northerly, westerly and southerly boundaries of the property patented to Andrew Randall and included within said boundaries was all of Limantour Spit to ordinary high tide.

6. The pertinent portion of the description in the patent which designates the northwesterly end of Limantour Spit, called Station 415, and which reads "S 17½° W 4.50 (chains)" is consistent with and does not conflict with the subsequent call "to the mouth of Limantour Bay."

7. The call to the "mouth of Limantour Bay" which follows the bearing and distance at Station 415 in the patent pertains to the width of Limantour Spit, and not to its length, and the term "mouth," as utilized in the patent description, was not employed by the deputy surveyor to designate "main entrance."

8. The patent, plat and field notes of the deputy surveyor establish that approximately 1⅓ miles of

irregular sandspit, situate northwesterly of the lowest channel at the 415 Line, was not surveyed nor included in the patent, and the water's edge at mean high water as found by the surveyor was in the secondary channel area in the vicinity of the 415 Line.

9. The traverse line numbered 415 of the field notes of the survey from which the perimeter description in the patent was prepared reads, "S. 17½° W. 4.50 to the mouth of Limanton's bay" (correctly spelled Limantour Bay in the patent). Said course "S. 17½° W." did not accurately depict the shore line of Limantour Bay or of the Pacific Ocean at the date of the survey or of the patent. Said Course "S 17½° W." and said distance "4.50" chains did not accurately extend to the monument called for, namely, the Mouth of Limantour Bay. Said traverse line from Station 415 to Station 416 of the survey was a meander line purporting to meander the shore line or line of ordinary high tide of Limantour Bay and the Pacific Ocean.

10. The ordinary high tide lines of Limantour Bay and the Pacific Ocean as they existed at the time of the survey and patent forming the boundaries of Limantour Spit are depicted on the U.S. Coast Survey Map between Duxbury Reef and Rancho Punta de los Reyes, 1859–60, Register 805 (Plaintiff's Exhibit 28) and on U.S. Coast Survey Map entitled, "Preliminary Chart of Drake's Bay, California" dated 1860 (Plaintiff's Exhibit 29), and at the time of the survey and patent Limantour Spit extended above ordinary high tide for approximately one and one-third miles westerly of the traverse line between Stations 415 and 416 as said line is shown by said survey.

11. The location of the mouth of Limantour Bay at the time of the survey and patent is depicted on

said U.S. Coast Survey Map dated 1859–60 (Plaintiff's Exhibit 28) and on said "Preliminary Chart of Drake's Bay" dated 1850 (Plaintiff's Exhibit 29) and was in fact approximately one and one-third miles westerly of the traverse line between stations number 415 and 416 in the survey and lay opposite the middle bluff of Drake's Head.

12. There is no evidence that at the time of the survey or patent islands of land surrounded by water at mean high tide existed in the area of Limantour Spit or that a channel of water at mean high tide existed at or near the traverse line between stations numbered 415 and 416 on the survey.

13. At the time of the issuance of the patent to Andrew Randall, Limantour Spit, of which the property involved in this action was a part, was a long narrow peninsula extending westerly from the upland and lying above mean high tide for its entire length.

14. It was the intention of the United States in issuing the patent to Andrew Randall to grant all of the lands previously granted to Osio by the Mexican government and to grant to Andrew Randall as part of the property conveyed all of Limantour Spit, including the property involved in this proceeding.

15. Since the date of the patent the Spit has been extended westerly for a distance of about one-half a mile as the result of natural accretion. Such changes as have occurred in the area of the Spit lying above mean high tide since the date of the patent have been the result of natural erosion or accretion.

16. By stipulation of the parties entered into at the trial as to the issue of title the parcel sought to be taken and condemned by plaintiff in this action is accurately described as of the date of commencement of this action as all that real property shown

on Plaintiff's Exhibit 66, commencing from the most westerly boundary of the recorded subdivisions known as Drake's Bay Unit No. 1 and Drake's Bay Unit No. 3, Marin County, California, and extending westerly to include all of that land contained within the contour line at mean high tide on Plaintiff's Exhibit 66.

Thereafter, on April 29, 1969, upon the motion of defendant, Drake's Beach Estates, Inc., for an order relieving defendant from any and all stipulations, findings, conclusions and judgments or orders relating to size of the property condemned or the accuracy of any documents purporting to represent the size or dimensions of the property, the Court, the Honorable Lloyd H. Burke sitting without a jury, having heard the testimony and having examined the proof offered by the defendant and the declaration filed by respective counsel, and having considered the points and authorities submitted by the respective parties, including the oral summation thereof, and the Court having fully advised in the premises, made the following order:

(a) IT IS HEREBY ORDERED that defendant, Drake's Beach Estates, Inc., is hereby relieved from any and all stipulations, findings, conclusions and orders based on any evidence or stipulations relating to the size and dimensions of that portion of Limantour Spit which is the subject property being condemned herein and is relieved of any stipulations, findings, conclusions or orders relating to the accuracy of any documents, including Plaintiff's Exhibit 66, purporting to represent the size and dimensions of said subject property.

(b) IT IS FURTHER ORDERED that the Court's Findings of Fact, Conclusions of Law and Judgment

signed by this Court dated June 29, 1966, and filed June 29, 1966, shall be amended, and modified by deleting therefrom, Finding of Fact No. 16 which commences on line 31, page 4 through line 7 page 5 thereof.

(c) IT IS FURTHER ORDERED that the determination of dimensions and area of the subject property are to be determined in the valuation phase of this case.

17. On January 29, 1964, defendant State of California filed its disclaimer of interest herein; on April 29, 1965, Marin County filed its disclaimer of interest herein.

CONCLUSIONS OF LAW

The following conclusions of law, insofar as they may be considered findings of fact, are found by this Court to be true in all respects.

From the foregoing facts, the Court concludes:

1. That the northerly, westerly and southerly boundaries of the land patent to Andrew Randall consisted of the shore line at mean high tide of Tomales Bay, of the Pacific Ocean, of Drake's Bay and of Limantour Bay as it then existed.

2. That the perimeter description in the patent issued to Andrew Randall by courses, distances and angles from the point on Tomales Bay marked Station 3 on the plat attached to the patent to the point on the Pacific Ocean marked Station 444 on the plat was a meander line intended to meander the shore lines at mean high tide of Tomales Bay, the Pacific Ocean (between Tomales Bay and Drake's Bay), Drake's Bay, Limantour Bay and the Pacific Ocean (south of Limantour Bay), and that the traverse line between Stations 415 and 416 was part of said meander line.

3. That the call in the patent which in the field notes is described as course 415, reading "to the mouth of Limantour Bay," controls over the course reading "S.17-½°W."

4. That the patent issued to Andrew Randall granted to the patentee all of Limantour Spit of which the land involved in this action is a part and that defendant, Drake's Beach Estates, Inc., is the successor in interest thereto by mesne conveyance of Andrew Randall.

5. That any increase occurring since the date of the patent in the area of the Spit lying above mean high tide to the date of the filing of this action belonged to the owners of the upland at the date of the commencement of this action, to wit, Drake's Beach Estates, Inc.

6. That at the date of the commencement of this action, Drake's Beach Estates, Inc., was the owner of all of the land sought to be condemned in this action as described in the complaint and declaration of taking of plaintiff on file herein, and the United States of America at the time of the commencement of this action had no right, title or interest therein.

JUDGMENT

In accordance with the foregoing findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED:

That defendant, Drake's Beach Estates, Inc., is the owner of all of that certain real property located in Marin County, California, consisting of all that portion of Limantour Spit lying above mean high tide at the time of the commencement of this action and as described in plaintiff's complaint and declara-

tion of taking on file herein, and that no other person or entity, including the United States and the State of California, at the date of the commencement of this action had any right, title or interest therein.

JURY TRIAL AS TO JUST COMPENSATION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the Complaint and Declaration of Taking in this case were filed on October 23, 1963, and concurrently with said filing the sum of One Dollar ($1.00) was deposited in the Registry of the Court.

2. That pursuant to written agreement entered into between the defendant, Drake's Beach Estates, Inc., signed July 20, 1963, and the plaintiff, acting by and through the National Park Service, signed on September 3, 1963, by Ben H. Thompson, Assistant Director, N.P.S., a copy of said agreement filed in this action as Defendant's Exhibit No. 67, the sum of One Dollar ($1.00) was deposited in the Registry of the Court with the filing of the Declaration of Taking, and interest on the judgment is waived by defendant until August 31, 1965.

3. That the use for which the property described in plaintiff's complaint and declaration of taking on file herein has been taken and condemned by the plaintiff is one authorized by law, and the said property and the taking thereof are necessary and suited to said use.

4. That all parties interested directly or indirectly in said property have been personally served with process or have appeared in said action; that said property, together with all claimants and parties interested therein, are within the jurisdiction of this Court which has power and authority to enter this judgment.

5. That the land for which just compensation was determined by the verdict of the jury and for which just compensation is being determined pursuant to this judgment consists of all that portion of Limantour Spit situated in Marin County, California, northwesterly of and adjoining the subdivisions known as Drake's Bay Unit No. 3, recorded in Book 11 of Maps, page 79, and Drake's Bay Unit No. 1, recorded in Book 10 of Maps, page 108, Marin County, California, which property is bordered by the mean high water line of Estero de Limantour, Drake's Estero and Drake's Bay.

6. That the estate in the land condemned by plaintiff, as described in its complaint and declaration of taking on file herein, is the fee simple title thereto.

7. Pursuant to the verdict of the jury, the fair market value of the land described in Finding No. 5 above is the sum of SEVEN HUNDRED THOUSAND DOLLARS ($700,000.00).

In accordance with the foregoing Findings of Fact and Conclusions of Law:

I

IT IS ORDERED, ADJUDGED AND DECREED that title to the estate and interest condemned in this proceeding as described in plaintiff's complaint and declaration of taking on file herein vested in the United States of America, free and discharged of all claims and liens of any kind whatsoever, upon the date of the filing of the Declaration of Taking and the depositing of the sum aforesaid, and that said estate and interest condemned are taken for the public use of the United States of America as authorized by law.

II

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sum of SEVEN HUNDRED THOUSAND AND NO/100 DOLLARS ($700,000.00) be and it is hereby awarded as the full, adequate and just compensation for the taking of all that portion of Limantour Spit situated in Marin County, California, northwesterly of and adjoining the subdivisions known as Drake's Bay Unit No. 3, recorded in Book 11 of Maps, page 79, and Drake's Bay Unit No. 1, recorded in Book 10 of Maps, page 108, Marin County, California which property is bordered by the mean high water line of Estero de Limantour, Drake's Estero and Drake's Bay; and it appearing that the sum of One Dollar ($1.00), being the amount on deposit in the Registry of the Court for the taking of said land, has not been withdrawn by defendant, the plaintiff, United States of America, is hereby directed to deposit the balance to be deposited pursuant to the verdict of the jury and this judgment, that is, the sum of SIX HUNDRED NINETY-NINE THOUSAND NINE HUNDRED AND NINETY-NINE DOLLARS ($699,999.00), together with interest thereon at the rate of six percent (6%) per annum, from September 1, 1965, until the deposit of such deficiency, with interest as aforesaid, into the Registry of the Court; and the Clerk of the above-named Court is hereby directed to pay the sum of SEVEN HUNDRED THOUSAND AND NO/100 DOLLARS ($700,000.00), the amount of the award as aforesaid, with interest as aforesaid, to defendant, Drakes' Beach Estates, Inc., forthwith upon deposit by plaintiff into the Registry of the Court of the sum of SIX HUNDRED NINETY-NINE THOUSAND NINE HUNDRED NINETY-

NINE AND NO/100 DOLLARS ($699,999.00) with interest as aforesaid.

DATED: May 6, 1970.

/S/ LLOYD H. BURKE,
United States Judge,
Northern District of California.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 1494

~~72~~-1494

UNITED STATES OF AMERICA,

Petitioner,

vs.

100 ACRES IN MARIN COUNTY, CALIFORNIA, DRAKE'S BEACH ESTATES, INC.

Amicus Curiae Brief of the State of California in Support of Petition for Certiorari Filed by the United States of America

EVELLE J. YOUNGER,
Attorney General of the State of California,

JAY L. SHAVELSON,
Assistant Attorney General,

600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-3126,

Attorneys for Amicus Curiae State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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UNITED STATES OF AMERICA,

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100 ACRES IN MARIN COUNTY, CALIFORNIA, DRAKE'S BEACH ESTATES, INC.

Amicus Curiae Brief of the State of California in Support of Petition for Certiorari Filed by the United States of America

Interest of Amicus Curiae

Pursuant to Rule 42(4) of the Revised Rules of the Supreme Court of the United States, this brief is filed by the Attorney General of the State of California in support of the petitioner United States of America.

It is the policy of the State of California, expressed by its Legislature and by vote of its people, to protect, preserve and enhance the remaining natural and scenic resources of its coastal areas. See, for example, the Marine Resources Conservation and Development Act (California Government Code sections 8800-8827, inclusive), and the California Coastal Zone Conservation Act of 1972 (Public Resources Code sections 27000-27650, inclusive). This policy can be most effectively implemented if areas of special importance to

the coastal environment and ecology, such as the lands here in litigation, are acquired by Federal, State or local governmental entities. If the decision of the Court of Appeals herein is allowed to stand, such acquisition could become difficult or impossible because values would be unduly inflated by an erroneous conception of State law and policy.

Summary of Argument

Amicus curiae State of California appears herein in support of plaintiff United States of America. Our purpose is to take issue with that portion of the opinion of the Court of Appeals which upheld the trial court's ruling allowing testimony as to the reasonable probability that the adjoining state-owned tidelands would have been available in connection with the development of the subject property for a subdivision. The decision (at p. 10) states,

> ". . . One probable use was to straighten the common boundary line and the other was to provide a source of land fill for the condemned property while dredging the State's channels for recreational boatways. . . ."

We respectfully submit that this portion of the opinion reflects a misunderstanding of California law in the following respects:

1. Since the trial court found that the property in question was in a state of nature, the record conclusively establishes that the State Lands Commission was not empowered to enter into a fixed boundary line agreement under section 6357 of the California Public Resources Code and that as a matter of practice and policy it would not have done so.

2. Even if the State could have entered into a boundary line agreement, it was compelled by law to determine the correct boundary and was not empowered to "straighten out" defendant's waterward boundaries.

3. The evidence establishes that the dredging of the adjacent tidelands would have violated State law, State policy, and the public trust for navigation, commerce and fishery.

ARGUMENT

I

The Record Conclusively Establishes That Defendant Could Not Have Entered Into a Boundary Line Agreement With the State as of the Date the Land Was Taken by the United States

Section 6357 of the California Public Resources Code provides that:

> "The [State Lands] Commission may establish the ordinary highwater mark or the ordinary low water mark of any of the swamp, overflowed, marsh, tide, or submerged lands of this State, by agreement, arbitration, or action to quiet title, whenever it is deemed expedient or necessary. . . ."

So long as lands adjacent to the tide or submerged lands are in a state of nature, unaffected by artificial influences or avulsion, the waterward boundaries thereof are subject to constant fluctuation resulting from natural and gradual changes in the shoreline. *Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 770-73; 161 Pac. 975, 977-78 (1916). It is obvious that under such circumstances a purported boundary line agreement would merely establish a historical boundary, which would immediately thereafter be subject to change by reason of accretion or erosion. The record herein conclusively establishes that under such circumstances the State Lands Commission would *not* in 1963 nor thereafter enter into a boundary line agreement with the upland owner and in fact refused to do so with regard to the very lands involved herein. Value Tr. pp. 2193-95; Plaintiff's Exhs. R-1 and R-2.

Once lands have been substantially affected by artificial influences, the waterward boundary line thereof

becomes fixed, and subsequent accretions do not inure to the upland owner but belong to the State. *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772, 787-94, 147 P. 2d 964, 972-75 (1944). It is only under these circumstances that the State can enter into a meaningful boundary line agreement. It is true that Mr. Nadey, a witness for the defendant, testified that the subject lands *had* been affected by artificial accretions. Value Tr. pp. 2202-04. However, this testimony must be disregarded in the face of the District Court's express finding that since the date of the original patent thereof (*i.e.*, June 4, 1860) all changes in the configuration of the subject land have been the result of *natural* erosion and accretion. Finding No. 15. The witness's speculation that a boundary line agreement was available to the landowner must be disregarded for the further reason that it is in conflict with uncontested documentary evidence (of which he was obviously unaware) that the landowner had been *refused* a boundary line agreement just eighteen months prior to the taking, because the lands were in a state of nature. Plaintiff's Exhs, R-1 and R-2.

II

Even if the Jury Was Properly Allowed to Consider the Possibility of a Boundary Line Agreement, Such Agreement Could Not Have as Its Purpose the "Straightening" of Defendant's Waterward Boundaries

During the course of his testimony, Mr. Nadey was permitted (over plaintiff's objection) to speculate that if, some time in the future, defendant should inform the State Lands Commission that defendant intended to develop the subject lands in such a manner as to create

an artificial condition, the Commission might then consider a boundary line agreement. Value Tr. pp. 2199-2203.

Even assuming the propriety of this testimony, it should be noted that the witness testified that the procedure followed by the Commission would be to run an actual survey of the natural line and, in the event the private owner introduced artificial influences immediately thereafter, it could be assumed that the survey line represented the last natural position of the seaward boundary. Value Tr. pp. 2200-01. California decisions demonstrate that any attempt to depart from this procedure and deliberately "straighten" the upland owner's boundary would create serious questions under the California Constitution. This is illustrated by the following language from the recent California Supreme Court decision in *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 480, 476 P. 2d 423, 436 (1970):

> "We reaffirm our holding in *Muchenberger*,[1] which we summarize as follows: When the boundary between public trust tidelands and private uplands is uncertain, and the parties, wishing to fix the boundary in order to prevent future questions of ownership, *undertake genuine efforts to determine the true boundary and thereafter agree to a line which fairly represents these efforts*, then the subsequent formal 'conveyance' in the form of a quitclaim deed by the trustee in furtherance of the boundary agreement does not evidence a 'grant or sale' of public tidelands within the meaning of article XV, section 3, of the State

[1]*Muchenberger v. City of Santa Monica*, 206 Cal. 635, 275 Pac. 803 (1929).

> Constitution. This principle is wholly consistent with the meaning and purpose of the constitutional provision, *for it simply permits the state and its trustee to undertake genuine efforts to determine the extent and true boundaries of public tidelands and to settle such boundaries in fair accordance with the findings resulting from those efforts.* (See also *City of Los Angeles v. Borax Consolidated Ltd.* (9th Cir. 1939) 102 F. 2d 52, 56-57.)" (Emphasis added.)

Even more objectionable under the facts in this case was the trial court's permitting the witness to speculate as to the possibility of defendant's straightening his boundary by means of an "exchange" pursuant to section 6307 of the California Public Resources Code.[2] Value Tr. pp. 2162-64. It is true that the State has the power to exchange tidelands under certain stringent conditions; however, such lands are held by the State subject to a public trust forbidding alienation which would impair navigation, commerce or fishery. (*People v. California Fish Co.*, 166 Cal. 576, 584-87, 138 Pac. 79, 82-83 (1913).) As discussed more fully below, the subject lands are in an area of vital ecological concern and any exchange of lands which led to the subdivision

---

[2]As of the date of the taking (October 23, 1963), this section read as follows:

> "Whenever it appears to the commission to be in the best interests of the State, for the improvement of navigation, aid in reclamation, or for flood control protection, on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits, the commission may exchange lands of equal value, whether filled or unfilled with any state agency, political subdivision, person, or the United States or any agency thereof. Any land so acquired shall have the same status as to administration, control and disposition as the lands for which it was exchanged."

thereof [Value Tr. p. 2179] would quite clearly impair the public trust because such exchange and ensuing development would undoubtedly be inconsistent with the retention of the ecological values of the area.

III

The Trial Court Erred in Allowing the Jury to Speculate That the Value of the Subject Land Was Enhanced by the Possibility That Defendant Might Obtain the Right to Dredge State-Owned Tidelands

As stated above, the State owns all tide and submerged lands within its boundaries subject to a public trust. The administration of this trust has been delegated by the Legislature to the State Lands Commission (Public Resources Code §6301), and the Commission is required by law to exercise all its discretionary authority in the best interests of the State (Public Resources Code §6005). The California Supreme Court recently stated that:

> ". . . There is a growing public recognition that one of the most important uses of tidelands—*a use encompassed within the tidelands trust*—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area . . ." *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P. 2d 374, 380 (1971) (Emphasis added).

The recognition that recreational and ecological purposes are included within the public trust is not a new concept in California law. *Forestier v. Johnson*, 164

Cal. 24, 40, 127 Pac. 156, 162-63 (1912); *Bohn v. Albertson*, 107 Cal. App. 2d 738, 744, 238 P. 2d 128, 132-33 (1951).

The record herein establishes beyond question the universal recognition that as of the date of taking (October 23, 1963) the subject lands, and the tidal waters adjacent thereto, were of vital ecological and environmental importance. Prior to September 13, 1962, when Congress passed the Act to establish the Point Reyes National Seashore, Public Law 87-657, 76 Stat. 538, the areas of State tidelands and submerged lands immediately adjacent to the subject lands were set aside by the State of California as a Clam Preserve and Eel Grass Preserve and oyster allotments were granted. [Pltfs. Exhs. BC and BD.]

On the other hand, the trial court itself characterized Mr. Nadey's testimony as "very general in its nature, describing the mechanics by which the Land Commission operates and the general procedures followed by staff members." Value Tr. p. 2187, lines 10-17. We submit that under these circumstances, the Jury should not have been allowed to speculate as to the likelihood that the State Lands Commission might allow the defendant to impair the public trust and the vital interests of the people of the State and the United States by dredging the adjacent waters and filling the subject lands to facilitate subdivision. We recognize the weight which must be given to the Jury's verdict. However, we submit that the following quotation from *White v. State of California*, 21 Cal. App. 3d 738, 759-60, 99 Cal. Rptr. 58, 73 (1971), reflects Federal as well as State law:

> " 'The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion' . . .; its value . . . rests upon

> the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion. . . . Such an opinion is no better than the reasons given for it . . ., and if it is 'not based on facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence . . .'" [Court's emphasis. The quote is from *Carter v. United States,* 252 F.2d 608, 617 (D.C. Cir. 1957).]

Here, Mr. Nadey merely stated the general practices of the California State Lands Commission. He demonstrated no specific knowledge of the crucial policy considerations (nor certainly of the legal considerations) which would be involved in the transactions about which he speculated and he was not aware that the defendant's request for a boundary agreement had been rejected. Hence, his testimony does not rise to the dignity of substantial evidence in support of this element of valuation.

Conclusion

The United States should be granted a writ of certiorari in this case and the judgment awarding compensation should be reversed and a new trial ordered.

DATED: May 14, 1973.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

BY JAY L. SHAVELSON,
Assistant Attorney General,
Attorneys for Amicus Curiae
State of California.

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In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
JUN 14 1973
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OCTOBER TERM, 1972

No. 72-1494

UNITED STATES OF AMERICA, *Petitioner,*

vs.

100 ACRES IN MARIN COUNTY, CALIFORNIA
DRAKE'S BEACH ESTATES, INC., *Respondent*

BRIEF OF DRAKE'S BEACH ESTATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JESS S. JACKSON, JR.,
RONALD J. MULCARE,
180 Park Road,
Post Office Box 709,
Burlingame, California 94010,
Attorneys for Respondent.

PERKAU-WALSH PRINTING CO. - 582 MISSION STREET - SAN FRANCISCO - CA 94105

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BRIEF OF DRAKE'S BEACH ESTATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals and the Findings of Fact and Conclusions of Law of the District Court are printed in Appendix "A" and Appendix "D", respectively, of the Petition. The opinion is reported at 468 F.2d 1261.

JURISDICTION

The judgment of the Court of appeals was entered on September 25, 1972, and a petition for writ of certiorari was filed on May 4, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). Respondent does not raise the question of jurisdiction.

QUESTIONS PRESENTED

1. On the Issue of Title:

The only question presented to and determined by the Court of Appeals was whether or not the findings of the District Court (to the effect that the land sought to be condemned was a continuation of the mainland lying above ordinary high tide and not an island at the time of the issuance of the patent through which Respondent deraigned title) were supported by substantial evidence.

(See Opinion of Court of Appeals, pages 4a and 5a of Appendix "A" to the Petition.)

2. On the Issue of Admissibility of Subdivision Evidence:

The question presented to and determined by the Court of Appeals was whether the trial court abused its discretion in admitting evidence as to lot sales, development costs and the "developer's residual appraisal method" for jury consideration in determining the fair market value of the condemned property, a unique property which was an integral part of an already developed subdivision the development of which was imminent and as to which there were no comparable sales.

3. **On the Issue of Admissibility of Probabilities Evidence:**

There was no procedural question presented to or determined by the Court of Appeals concerning the function of the trial judge and jury per *United States v. Reynolds,* 397 U.S. 14 (1970). The only issues presented to and determined by the Court of Appeals dealt with the *competency* of an expert witness and, as to the *sufficiency of a foundation* (under *Olson v. United States,* 292 U.S. 246 (1934) for the *admissibility* of his opinion testimony, dealing with reasonable probabilities evidence (exchange of land procedures, dredging on state tidelands, etc.), which evidence was admitted for jury consideration in determining market value.

Nor does the trial record present this question. Rather 1) the trial court did find a sufficient foundation existed for admissibility of this evidence, 2) the jury properly considered evidence and reasons given in support of expert opinion as to reasonable probabilities (of an agreement re tidelands—the jury did not determine "tidelands policy"—there was no such "policy"). There were two statutes (each authorizing an agreement) and reasons were given to the Court for application of said agreements; the government's characterization of one of these considerations as a "policy" is specious. Furthermore, the government *induced* the trial court into the procedure followed (submission of size, dimensions and adaptability of use to the jury), and because of induced error cannot complain. Thus the only question is whether there is substantial evidence to support the judgment.

STATEMENT OF CASE

This eminent domain action was commenced by the United States to condemn for park purposes approximately 200 acres of a 300 acre sandspit located in Marin County, California.

The sandspit taken was a portion of some 1900 acres of property owned by Drake's Beach Estates, Inc., a California corporation.

1. On the Issue of Title:

The Opinion of the Court of Appeals contains a succinct statement of the case on the issue of title and we will not burden the Court with a repetition of it here. (See pages 3a, 4a and 5a of Appendix "A" to the Petition.)

Initially, in the District Court, the United States took the position that the traverse lines of the survey as recited in the patent constituted the boundary of the lands granted and not the actual shoreline despite the fact that the patent itself recited that the land was bounded on one side by the Estero of Tomales and on two sides by the Pacific Ocean. This contention was abandoned on appeal and Petitioner conceded that the actual shoreline constituted the boundary and that if the land was part of the sandspit or peninsula and not an island at the time of the survey, it was included in the patent and is now owned by Respondent. (Opinion of the Court of Appeals, pages 3a and 4a of Appendix "A" of Petition; page 6 of Appellant-United States Brief in the Court of Appeals.) Under the facts and the law,

no other position was tenable. *Hardin v. Jordon,* 140 U.S. 371 (1891); *Thomas R. Bishop Co. v. Santa Barbara County,* 96 F.2d 198 (9th Cir. 1938), cert. den., 305 U.S. 623; *Anderson v. Trotter,* 213 C. 414 (1931), cert. den., 284 U.S. 686.

The District Court found that the land at the time of the survey and patent was part of the mainland lying above ordinary high tide for its entire length. (See Findings 10, 11, 12 and 13, pages 4a and 5a of Appendix "A" to the Petition.) No question was presented to the Court of Appeals on the issue of title other than the question of whether these findings were supported by substantial evidence.

Petitioner in the phrasing of the "Questions Presented" and elsewhere suggests that the only evidence presented was an 1859-1860 United States Coast Survey Map. Obviously, the writer of the petition neither attended the trial nor examined the record. Over 100 exhibits were introduced on the title issue consisting chiefly of maps, plats and surveys dating from 1854 to 1967, and four experts testified on this issue. Petitioner states that this issue rests on "documentary evidence and the Court of Appeals undertook no independent analysis of the facts on this issue". (Petition Page 10) The Opinion of the Court of Appeals is to the contrary: "We have carefully considered the evidence in the record on which the respective parties rely, both documentary and otherwise, in regard to the title issue and believe there is ample evidence to support the findings and conclusions of

the trial court on this issue". (Page 6a of Appendix "A" to the Petition).

Inasmuch as the only question presented to and determined by the Court of Appeals on the issue of title was whether the findings of the District Court were supported by substantial evidence, it is respectfully submitted that this is not an issue upon which this Court should grant a writ of certiorari.

2 and 3. On the Issues of Admissibility of Subdivision and Probabilities Evidence:

The condemned property was part of a recreational and residential development in progress on the entire acreage. As of the date of taking, Drake's Beach had commenced development of the entire spit. Five units of this subdivision had already been recorded (RT 198). Portions of the 300 acre sandspit had been filled and graded (in part) (RT 229-236), properly zoned (RT 193-197, 257), four miles of access roads were developed (RT 201, 547, 551-53, 551: 17-20, 562, 566), water developed (RT 211-214, 217-221, 235, 258, Exhibit 14, 291-296), planning and mapping approved (RT 196, 204-210), financing was arranged (RT 216), and California Division of Real Estate Reports were issued (RT 223).

In the Spring of 1962 development of the condemned property was imminent. It had been zoned and mapped as part of the overall subdivision general plan, and utilities, grading (RT 2194) water (RT 291-296) roads and financing were immediately available and ready to complete. Physical work had commenced, in-

cluding surveys (RT 2205, 2228, 4125, 4140), grading and fill (RT 230, 231), and soil tests (RT 222, 312, 4257, Exhibits 91, 102).

Demand for these subdivision lots was clearly strong (RT 245, 242, 246, 258, 262-263).

The government's project activities, including deliberate interference with this subdivision, culminated in the Spring of 1962 to prevent further subdivision and sales (RT 264, 2152-2155, 2165). Otherwise portions of this condemned property would have been developed and sold (RT 265, 266, 2151) *before October 23, 1963,* the date of taking.

For approximately one and one-half years this condemned parcel, while unable to proceed to completed subdivision, was not "taken." On October 23, 1963, a Declaration of Taking and Complaint were filed taking this property.

The case was bifurcated into two trials. The first phase of trial was on the issue of title. Judgment awarded title to defendant Drake's Beach (C.T. 196-203).

Drake's Beach then moved for a preliminary determination as to the size and dimensions of the condemned parcel by the Court, sitting without a jury. This motion was denied at hearing on April 29, 1969 (RT 5, 33, 34). At the government's urging, the District Court decided these should be submitted to the jury.

The second phase of trial, to determine market value, commenced on September 8, 1969 before a jury.

Evidence as to the size, dimensions, adaptability, use, as well as evidence of value, was presented to the jury.

The government's witnesses valued the land at $185,000.00 (based on 146 acres, RT 3971), $265,000.00 based on 212 acres (RT 3995) and $171,000.00 based on 146 acres (RT 3556).

The owner's three witnesses testified to the fair market value of the condemned property as $1,995,000.00, $1,600,000.00 and $1,600,000.00, respectively, in the condition it was in in 1963 (RT 370, 2243, 2302-03, 2496), taking into consideration those things which a buyer and seller would consider (RT 370, 2242, 2302-2303, 2496-2510).

On November 28, 1969, the jury rendered a verdict finding that just compensation for the land condemned as of October 23, 1963 was $700,000.00 (CT 472).

The owner's witnesses testified that a buyer and seller would consider the lot prices less the cost of completing the improvements among those matters bearing upon the value of the condemned property in the market.

Two of the owner's witnesses also testified to a comparable lot sales adjustment process and to the "developer's subdivision residual appraisal" approach (a market analysis of subdivision data) frequently used in the market which analyzed the adjacent market data of this subdivision and making appropriate deductions (development costs, selling and advertising

expenses, direct engineering and indirect costs (such as overhead, taxes), buyers anticipated profit, and gross acreage loss (to streets, etc.)) as factors which would affect the value of the condemned property at the time of taking. (RT 366-372, Exhibit 17, 2609, Exhibit 86B). The government objected to the Court's exercise of its discretion in admitting evidence of the lot prices and subdivision expenses it was established that the data itself and the developer's approach appraisal method are utilized in the market. This was conceded by the government's own appraiser.

The owner also presented testimony as to the reasonable probability of an agreement with the State that adjacent tidelands would have been available for temporary uses (dredging of small boat navigation channels, crossings, etc.) and to permanently fix the common boundary (by land exchange or boundary line agreement) (RT 2033, 2037). There was evidence that such use was beneficial and logical for both parties. One advantage was to permanently fix the common boundary line between the State and owner. It was proposed that portions of the subject property be donated to the public for beaches in the exchange. It was proposed by the State that dredging of the state's tidelands be done on a royalty basis (RT 2038, 2039), which dredging would provide boat channels for recreation.

The Court considered and then permitted the jury to consider and weigh: (1) Evidence that negotiations had taken place between the state and this owner, in the year or two preceding the filing of a Declaration

of Taking, toward a dredging and fill agreement; there was conflicting evidence as to why those negotiations were terminated, i.e., that they were withdrawn by the owner because the subdivision had been blocked by the government; (2) That some seventy (70) land exchange and boundary line agreements had been made by the state in the years preceding this taking, with several occurring in the same county, one of which was at Stinson Beach, a sandspit which had been subdivided and which was very comparable to the subject property; (3) the opinion testimony of a state agent and others that there were reasonable probabilities of such an agreement being achieved between this property owner and the state within a reasonable time from the date of taking; and (4) various reasons supporting and contrary to these opinions, including motivations of the parties.

As foundation for these opinions it was established that only two tracts were involved; the State had motives favorable to such agreements, including development of recreation and improvement of navigation, (RT 1982, 1993, 1994, 2042, 2043); the manner in which the agreements and permits were to be secured (RT dredging, 1976 et seq.); exchanges, etc., (RT 1980 et seq., 2116, 1984-87, 2025); the nature of the work (RT 1621); the legal availability of agreement (RT 1973, 1974, 2025); that many comparable transactions had been approved, several in the same area on virtually identical tidelands (RT 1988-1993, 1635); the costs and feasibility relating thereto (RT 1431, 1542, 1553, 1560); the cost of other alternatives

(RT 1430-1432, 1637-1642, 1726-1731, 1739); as well as the reasonable probability of such consents being obtained (RT 1356, 1621, 2027, 2033, 2036-2038, 2094). In fact the witness (state agent, Mr. Nadey) was the working officer for the State on these matters and his recommendations had almost been approved.

Throughout the trial the Court instructed the jury that the amount to be awarded was the fair market value of the property taken as it stood on October 23, 1963 (RT 2342-2347, 2318).

The verdict of the jury ($700,000.00) was more than the government's testimony, and less than the owner's testimony, and represents $3,300 per acre for 212 acres.

ARGUMENT

I

QUESTIONS ON THE TITLE ISSUE AS PRESENTED IN THE PETITION

Question No. 1 on page 2 of the Petition:

In the first part of this question, Petitioner is apparently reverting to the position taken in the trial court, namely that the traverse lines of the survey and not the actual shoreline constituted the boundary of the lands title to which was confirmed by the patent. In *Niles v. Cedar Point Club*, 175 U.S. 300 (1899) the surveyor drew a meander line along the inner edge of an extensive marsh bordering on Lake Erie. The Court held under the special facts of that case that the land patented extended only to the meander

line and that the meander line was intended to meander the edge of the marsh and not the shores of Lake Erie. (In this case no such question is presented because the meander line was admittedly a meander of the shores of Limantour Bay and of the Pacific Ocean. The patent said so.) However, in the latter part of the question Petitioner assumes that the surveyor found a channel at ordinary high tide where he drew the traverse "S.17½° W. 4.50" line, an assumption directly contrary to the facts and to the express findings of the trial court. Of course, if a channel actually existed there that would have been the boundary and no problem as to whether the traverse line or the actual shoreline was a boundary would arise. The first part of the question implies that the traverse line in the survey and not the shoreline was the boundary, and the second part assumes that the shoreline and the traverse line were at the same place, contrary to the facts as found. With all due respect to the Solicitor General this question as phrased is unintelligible.

Question No. 2 on page 2 of the Petition:

In the phrasing of this question Petitioner makes three assumptions, none of which are true. The first is that the District Court's findings were "based only on a Coast Survey map". The falsity of this assumption would be made evident by the most cursory examination of the record. Numerous maps and charts both antidating and postdating the U.S. Coast Survey Map of 1859-60 were introduced into evidence and considered by the trial court. The second false as-

sumption is that this map was "designed solely for navigational purposes". This is a map of the land showing contour elevations as well as the ordinary high tide line and the ordinary low tide line. (Plaintiff's Exhibit 28). The writer has apparently confused this map with another U.S. Coast Survey Map entitled "Preliminary Chart of Drake's Bay" also dated 1860, showing marine soundings. (Plaintiff's Exhibit 29) The third false assumption is that the surveyor's notes refer to "a channel of water" separating the spit from the mainland. Nothing of a sort appears in the surveyor's notes. (Plaintiff's Exhibit 3) He simply drew a traverse line.

Neither the record in this case nor the decision of the Court of Appeals presents for determination either of the questions on the issue of title as posed in the petition.

II

ON THE EVIDENTIARY ISSUES

The evidentiary questions urged upon this Court by Petitioner relate solely to whether the District Court *abused its discretion* in admitting certain evidence as relevant to market value, that is in allowing the jury to consider evidence consisting of (1) lot sales, development costs and the developer's subdivision residual appraisal method and (2) opinion evidence (and the reasons and facts relating thereto) of reasonable probabilities (i.e., an agreement with the State on adjacent tidelands boundaries and dredging which agreement was an alternative manner of utiliz-

ing the property which a buyer and seller would consider in the market.

The rule in regard to the admissibility of market value evidence in an eminent domain case is well stated in *United States v. 55.22 Acres of Land, etc., Yakima Co., Wash.*, 411 F.2d 432, 434 (9th Cir. 1969).

> "The determination of that question calls for an exercise of a *sound discretion* by the trial court, and the ruling thereon is reviewable only for abuse of discretion." (emphasis added)

The Court of Appeals has already reviewed the facts and record in this case. It concluded "that the trial court did not abuse its discretion in admitting the evidence of appellee, Drake's Beach, on the question of fair market value."[1]

A.

Subdivision facts and appraisal method evidence are admissible (On Question No. 3 on page 2 of the Petition)

The government's third question as framed states in part that the developer's residual method is ". . . unrelated to elements of actual fair market value." This implies that the evidence at trial of lot prices, development costs and the developer's subdivision residual appraisal method was not actually based upon factual market data which would be considered in the market by a buyer and seller.

In the record, there is substantial evidence that the evidence offered was from the immediate market, was accurate, comparable, and the best evidence and

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[1]Opinion of Court of Appeals, page 10a of App. A to Petition.

manner of appraisal to use in appraising this unique property. Thus the question, as framed, is disproven by the record at trial.

As the Court of Appeals notes, "the property in question was part of a recreational and residential development in progress. . . . Indeed, some preparatory physical work had already been completed."[2] Thus in the instant case the Drake's Beach Estate's property was in fact a property being subdivided and a substantial portion of the evidence used at trial were facts, generated in the development of this very subdivision.

1. Lot sales separately admissible

It is well established that the comparability of market data and sales is within the discretion of the trial judge. Lot sales are independently admissible as relevant to market value.[3]

2. Development costs separately admissible

It is also well established that evidence of development costs is independently admissible evidence, relevant to market value.[4]

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[2]Opinion of Court of Appeals, page 8a of App. A to Petition.

[3]*United States v. Lowrie*, 246 F.2d 472 (4th Cir. 1957); *United States v. 12 Tracts*, 268 F.Supp. 125 (1967); *United States v. 55.22 Acres*, 411 F.2d 432 (9th Cir. 1969); *United States v. An Easement and Right of Way*, 248 F.Supp. 702, 703 (1965); *People v. Auburn Ski Club*, 241 Cal.App.2d 781 (1966).

[4]*McCandless v. United States*, 298 U.S. 342 (1936) (costs of developing sufficient water supply to condemned property from offsite source); *United States v. Certain Land in Brooklyn*, 346 F.2d 690 (2d Cir. 1965) (demolition costs on comparable sales); *United States v. 84.1 Acres*, 348 F.2d 117 (3rd Cir. 1965) (reverses exclusion of costs for clearing timber on comporable land to adjust subject to comparable data).

3. Testimony as to the "developer's" or "subdivision appraisal method" is admissible

In condemnation actions, where subdivision of a condemned property is imminent or reasonably probable in the near future, it is well established that testimony as to the "developer's" or "subdivision appraisal approach" is admissible as relevant to market value and as to use.[5]

4. Rules favor admissibility

The admissibility of such evidence is well supported by sound policy. The Federal courts properly

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[5]*United States v. Iriarte*, 166 F.2d 800, 804 (1st Cir. 1948) (cert. den. 335 U.S. 816 [1948]); *Highland Park v. United States*, 142 Ct.Cl. 269 (1958); *Hazard Lewis Farms v. State of New York*, 1 A.D.2d 923 (1956), 149 N.Y.S.2d 658; *State Highway Dept. v. Thomas*, 128 S.E.2d 520; *State v. Cobb*, 169 So.2d 419; *United States v. Easement and Right of Way Over Two Strips*, 284 F. Supp. 71 (1968); *United States v. Waterhouse*, 132 F.2d 699 (9th Cir. 1943) aff'd 321 U.S. 743 (1944) (wherein a non-existent subdivision—contrasted with the instant property which was a subdivision with some completed work—was projected, and comparable rentals—contrasted to actual lot prices on the condemned subdivision—were utilized to estimate rentals (lot prices) on the condemned property, and then appropriate estimated costs were deducted to aid in determining fair market value); *Buena Park School Dist. v. Metrim Corp.*, 176 Cal.App.2d 255 (1959); *Santa Clara County Flood Control & Water Conservation Dist. v. Fratis*, 177 Cal.App.2d 264 (1960); *Dash v. State*, 491 P.2d 1069 (1971); *Drake's Bay Land v. United States*, 424 F.2d 574 (Ct.Cl. 1970) and 459 F.2d 504 (Ct.Cl. 1972); *Hopkins v. Blank*, 506 P.2d 57. In those cases which have excluded evidence of lot sales, there was a lack of foundation evidence or no subdivision activity was imminent. The opinion of the Court of Appeals more completely states the prevailing rules and rationale. (App. A to Petition, pages 6a through 11a).

The only case cited by the government to the contrary is completely distinguishable on its facts; *United States v. Hickey*, 360 F.2d 127, 137 (7th Cir. 1966) was a criminal case in which just compensation was not the issue, not a condemnation case. The instant case is unique and therefore it distinguishable on its facts in two respects: the instant property was under subdivision, and there were no comparable sales.

follow a rule of admissibility of evidence which permits the District Court to exercise its sound discretion. This discretion is reversible only for its abuse.[6]

5. Subject property presented a rare condemnation appraisal problem

The condemned property was available for immediate subdivision development. Sales of lots identical to the ones commenced on the subject property had taken place immediately next door on property of which the subject property was, prior to this taking, a part. The development costs used to adjust the lot sales were factually related to costs recently incurred in the same project. There was an absence of sales of comparable property. Consequently, the "developer's appraisal approach" was deemed the most reliable appraisal method. (RT 2244, 2510).

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[6]Federal Rules of Civil Procedure, Rule 43(a), provides in part: "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which *favors the reception* of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made." *Wibye v. United States.*, 87 F.Supp. 830 (1949), aff'd 191 F.2d 181 (9th Cir. 1951); See also *Napa Union High School Dist. v. Lewis*, 158 Cal.App.2d 69 (1958) which holds: "The rules for determining value of land taken by condemnation cannot, from the nature of the case, be inflexible. In each case, just compensation is the goal; and where a rigid application of even a settled rule will produce injustice it must be departed from so far as made necessary by the circumstances of the case." This concept of flexibility is endorsed in *United States v. Miller*, 317 U.S. 369, 373 (1943).

6. In absence of comparable sales, other methods and data are admissible

Where for any reason there is an absence of truly comparable sales and the property being appraised is readily marketable as a subdividable property, recourse must be had to an appropriate means of ascertaining value.[7]

7. Evidence admissible which would influence an informed buyer and seller of a developing subdivision

All facts which an owner would properly and naturally impress upon the intention of a buyer, and all facts which would influence a person of ordinary prudence desiring to purchase the property are admissible. *Kimball Laundry v. United States,* 338 U.S. 1 (1949).

Drake's Beach Estates' appraisers maintained that a buyer and seller would surely consider the existing

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[7]See *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949). The government's appraisal witnesses admitted there were no sales of "truly comparable" property (RT 339, 224, 2509-2511, 4031). In the absence of comparable sales, other methods must be resorted to in order to ascertain market value. In order for sales of other property to be admissible and relevant, that property must in fact be comparable. *Fairfield Gardens, Inc. v. United States,* 306 F.2d 167, 172 (9th Cir. 1962). *United States v. Miller,* 317 U.S. 369 (1943) ("Where for any reason property has no market, resort must be had to other data to ascertain its value; and even in the ordinary case, assessment of market value involves the use of assumptions which make it unlikely that the appraisal will reflect true value with nicety."); *St. Joe Paper Co. v. United States,* 155 F.2d 93, 97 (5th Cir. 1946); *Hanson Lumber Co. v. United States,* 261 U.S. 581, 589 (1923) (original costs, replacement costs); *United States v. Sowards,* 339 F.2d 401 (10th Cir. 1964) ("In condemnation cases market value is usually established by sales of like property. It does not follow, however, that the owner is precluded from proving value when there have been no comparable sales. In such cases, resort may be had to the best available data which, even though speculative, under some circumstances, may be sufficient to allow a jury to make an informed estimate of value."); *United*

successful subdivision activity, including proven demand, lot sales, development costs, etc., which had been generated in this very development, especially since sales of lots from the condemned property were imminent (and, in fact, stopped by the government in 1962, one and one-half years before the Declaration of Taking filed in October, 1963 (RT 1558)).

These judicially accepted rules supporting admissibility, considering the ultimate goal of "just compensation" in a condemnation case, well support the admissibility of lot sales, development costs and the "developer's subdivision residual appraisal method" as evidence of market value an informed buyer and seller would consider. This is particularly so where the subject property is a part of a developing subdivision, and portions of it would have been developed but for the interference by the government for two years preceding the taking.[8]

States v. 2.1 Acres, 138 F.2d 295 (7th Cir. 1943) (No true comparable sales—all relevant facts); *Todd v. United States*, 155 Ct.Cl. 111 (1961); *United States v. Benning*, 276 F.2d 248, 251 (5th Cir. 1960) ("Where few sales, other evidence is properly admitted in the discretion of the court.")

[8]Having successfully thwarted (and illegally interfered with) the owner's property rights for approximately two years before the taking, the government would have the courts block evidence of the reasonable probability of development and the lot prices which would have been realized absent the government's interference. These steps in thwarting development advanced the government towards its own project; therefore, those prohibitions placed on development by the government must be ignored and the property considered in its hypothetical condition in the absence of the adverse effect and interference resulting from the condemnor's project. *United States v. Miller*, 317 U.S. 369 (1943); *United States v. Meadowbrook Club*, 259 F.2d 41, 45 (2nd Cir. 1958); *Drake's Bay Land v. United States*, 459 F.2d 504 (1972); *In re Elmwood Project (City of Detroit v. Cassese)*, 376 Mich. 311; *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964); and *Sayre v. United States*, 282 F.Supp. 175 (1967).

8. Government contentions disproven by the record

The arguments the government now advances completely ignore the record and lack pertinent authority. Among them are the following:

(a) *Appraisal Method:* The government inaccurately states that there is no proof that this appraisal technique is used in the area. The record shows to the contrary.[9]

(b) *Not Speculative:* The government has characterized the developer's subdivision residual approach as "speculative." The District Court and the Court of Appeals did not agree,[10] and for good reason. It was testified that this subdivision method (as well as the data upon which it was based) was the most reliable appraisal method for this particular property which was under subdivision development.[11]

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[9]The "developer's" (or "economic") approach is well recognized and accepted as an appropriate appraisal method for value determination. For example, see Paul Fullerton, "Development Analysis for the Valuation of Vacant Land," in *Journal of the American Institute of Real Estate Appraisers*, Vol. XXXIII (April, 1965), pp. 211-225. Even the government's appraisal witness frankly conceded that this was a proper approach, as fair as any (RT 4128), and that had he more time he would have used this approach in this case, and that it could have been his primary approach (RT 4007, 4130, 4043, 4010 and 4028).

[10]Opinion of the Court of Appeals, page 9a of App. A to Petition:

> "It is claimed the method is speculative in the extreme. . . . We do not agree."

[11]The owner's appraisal witnesses steadfastly maintained that in the absence of any comparable sales, this appraisal approach was the *only* reliable appraisal method (RT 2244, 2510).

(c) *Related to Market:* Next, the government states that this evidence is "not related to the market." The lot sales, development costs, and the particular data that went into the developer's subdivision residual appraisal method had been generated from the very development of which the subject parcel was a portion, and the facts were demonstated as relating to the subdivision immediately adjacent to the condemned property. It was testified that this appraisal approach is the typical one a prospective buyer employs in making an appraisal of land under development or potential development for subdivision. In condemnation, it is the market we are attempting to emulate. *Almota Farmers Elevator and Warehouse Co. v. United States*, ... U.S. ..... (No. 71-951).

(d) *Market Value—Not Highest Price:* It is unfairly inferred by the government that the owner equated the developer's residual appraisal method with market value, and that said appraisal process indicates the "highest prices," not the "actual price" (whatever that is). As the Court of Appeals notes, the "trial court correctly instructed the jury during the trial that the amount to be awarded was the fair market value of the property as it was on October 23, 1963 . . .". (Opinion of Court of Appeals, pages 10a and 11a, of App. A to Petition.)

The owner's witnesses did not urge that a buyer and seller who sought to negotiate an open market sales would have paid the "ultimate sale price" of the completed lot prices and ignore appropiate adjustments. Nor did the owner's appraisers equate fair

market value to the values indicated by the "developer's residual appraisal process."[12] This appraisal process was merely considered among all the factors a buyer and seller would consider in the open market.

(e) *Increased Litigation:* Lastly, the government threatens a spector of increased litigation, if liberalized rules of evidence are permitted. First, the test of admissibility of evidence is and should remain relevancy. The object of a condemnation trial is just compensation. There should be an attempt, in condemnation proceedings, to simulate as closely as possible the factors which actually influence the market. The developer's residual appraisal method is used in the market and it considers facts deemed relevant by buyers and sellers in the market. It is particularly pertinent in a case such as this where a unique property (no comparable sales) is under development at the time of condemnation. Second, if litigation were to increase, it should have already happened, since established judicial precedent has already held this appraisal method, and the data upon which it is based, admissible.

9. This case turns on its own facts

The evidence (and as to reasonable probabilities) was clearly relevant to use and to value. Its admission is supported by sound precedent and good sense, essentially because the land condemned is unique, a developing subdivision on a large sandspit, and truly

[12]The owner's appraisal opinions were less than the value of the land as indicated by lot prices less costs of completing the subdivision (RT 2252, 2284, 2315, 2534 and 2606).

comparable data was non-existent. Despite its need for adjustment or interpretation (all evidence, even "comparable sales" need adjustment), this was the *best* evidence available.[13]

Considering that the government suppressed the completion of the subdivision and thus rendered "hypothtical" what would have been in large part fact on the condemned property, what *was* fact (dredging activities contracted for, lot sales, developments costs actually incurred, etc.) within this very subdivision should certainly be admissible to show the market value of what truly *was* taken from this owner.

10. Desired result: indemnity for what was taken

In a condemnation proceeding, the desired result is to see that the landowner is put in as good a position pecuniarily as he would have occupied if his property had not been taken. *Seaboard Airlines R. Co. v. United States,* 261 U.S. 299 (1923). The measure of indemnity must remain flexible to fit the case. *United States v. Miller,* 317 U.S. 369 (1943).[14] The very essence of condemnation law is to assure that no individual owner should bear a disproportionate

[13]As the District Court said, "[This was] '. . . probably the best one could do under the circumstances . . . .'" (RT 5163).

[14]In *United States v. Miller*, supra, this Court stated:

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted and have retained, the concept of market value. The owner has been said to be entitled to the . . . fair market value of what is taken."

share of the costs and losses imposed by public works. Since the public benefits it should pay for losses imposed. This Court has laid down broad guidelines (as set forth above) for the purpose of achieving this desired result, i.e., "just" compensation. The measure and method of ascertaining just compensation should remain flexible to fit each case. When a developing subdivision is taken, those things which would influence the market should be considered.

11. Summary

Inasmuch as the only question presented to and determined by the Court of Appeals on this evidentiary issue was whether the District Court abused its discretion in admitting evidence (as to lot sales, development costs and the developer's subdivision residual appraisal method), it is respectfully submitted that this is not a matter on which this Court should grant a writ of certiorari.

B.

Opinion evidence as to reasonable probabilities (of availability of an agreement with the state adjoining tidelands) is admissible
(On Question No. 4 page 3 of the Petition)

1. No procedural question was presented to the Court of Appeals

The Government's fourth question raises a procedural question only ,i.e., is the consideration of this evidence for the jury?[15] Thus, the Government has

[15]The Government's fourth question is new. It is phrased: "Whether the rulings below permitting the jury to determine what State tideland policy had been at the time of taking conflict with this Court's decision in *United States v. Reynolds*, 397 U.S. 14 (1970)."

abandoned its attack in the Court of Appeals on the admissibility of reasonable probabilities evidence and competency of an expert witness.

The opinion of the Court of Appeals does not present for determination the fourth question in the Government's petition. Thus the Government now represents a procedural question, different from that question which was presented to or determined by the Court of Appeals.

Since this procedural issue was not raised below, we urge it is improper to raise it before this Court. In addition it lacks merit on the record. The judge preliminarily considered this evidence (in ruling on its legal and factual availability), and then the jury considered it in relation to market value (as a factor —an alternative way to utilize the property) and in its bearing on size and uses of the condemned property.

2. For the jury to consider (admissible)

Opinion evidence as to reasonable probabilities of agreements with the State is relevant and admissible as to its market value and use. *McCandless v. United States,* 298 U.S. 342 (1936); *United States v. Waterhouse,* 132 F.2d 699 (9th Cir. 1943), aff'd 321 U.S. 743 (1944); *Olson v. United States,* 292 U.S. 246, 255 (1934); *United States ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, 275 (1943).

Where evidence shows reasonable probability of agreements affecting adaptability of lands for specific uses, the evidence regarding prospective uses is ad-

missible, and whether adaptability and probability affect market value is for the jury. *United States v. Waterhouse, supra.* The weight of reasonable probability opinion evidence is a question properly left to the trier of fact. *United States v. 3276.21 Acres,* 194 F.Supp. 297, 302. See also, *Olson v. United States, supra; McCandless v. United States, supra.* All facts which would naturally and properly impress a buyer or seller should be proper. *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).[16]

Also under Rule 43[17] the rules of evidence of the State of California also apply to admit this evidence.[18]

The Federal practice follows this rule favorable to admissibility. See *Wibye v. United States,* 87 F.Supp. 830, aff'd 191 F.2d 181 (9th Cir. 1951).

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[16]The test is what uses and what factors would be considered in the market place. *United States v. Land in Drybed of Rosamond Lake,* 143 F.Supp. 314, 318 (1956). There should be consideration of all facts which can be expected to reasonably affect price. *United States v. 4.105 Acres,* 68 F.Supp. 279, 299 (1946). Any evidence of what might reasonably influence a willing seller and a willing buyer should be considered in determining market value. *Wolff v. Commissioner of Puerto Rico,* 341 F.2d 945, 947, 948 (1st Cir. 1965). No evidence should be excluded which an ordinary prudent man would take into account. *United States v. Ham,* 187 F.2d 265, 267 (8th Cir. 1965). The purpose is to emulate the market. *Almota Farmers v. United States,* ..... U.S. ..... (No. 71-951), 93 S.Ct. 791 (1973).

[17]Federal Rules of Civil Procedure, Rule 43(a) says in pertinent part: "All evidence shall be admitted which is admissible under the *rules of evidence* applied in the Courts of general jurisdiction of the STATE in which the United States Court is held . . . In any case, the . . . rule which favor." (Emphasis added).

[18]In California, it is well settled that reasonable probabilities evidence is admissible, e.g., see *People v. Ogata,* 240 C.A.2d 262, 269, 49 Cal.Rptr. 397 (1966).

3. Preliminary matters were decided by the judge

This opinion evidence was relevant, and therefore the trial judge admitted it for jury consideration. The trial judge also performed his function.[19] The record will reveal that the trial judge preliminarily decided the matters of "legal availability" and "fact-

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[19]The Government now argues: "The question of what state policy was prior to the federal project on the use of state wetlands was a collateral matter to be determined by the trial judge." The question implies the trial judge did not decide whether there were any State objectives (not "policies" by correct definition) which affected the legal availability of the agreements. The Government's use of the word "policy" is incorrect on the record, and loose semantics.

One basic fallacy of the Government's fourth question is that it assumes, contrary to the record below, that any "policy" exists at all. As the word "policy" is defined, there was no single or dominant "policy" in this case.

The word "policy" is defined (by Webster's New World Dictionary, College Edition) as: "wise management; any governing principle plan or course of action; and (by Black's Law Dictionary, Fourth Edition) as: "The general principle by which a government is guided in its management of public affairs, or the legislature in its measures . . ."

Public policy properly cognizable by courts is that clearly derived from the Constitution, statutes and judicial decisions of the entity. *Brown v. American Railway Express Corp.*, 128 S.C. 428, 123 S.E. 97, 98; *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120, 122; *Hogston v. Bell*, 185 Ind. 536, 112 N.E. 883, 886; *New York Life Insurance Company v. Hamburger*, 124 Mich. 254, 140 N.W. 510, 512.

From this pure meaning of the word, there was no "policy" as such from the transcript below for there was no clear or paramount objective or objectives unopposed by other State goals or motivations (or "policies") which guided State action as to its tidelands. What is more, there were several to an effect opposite of that urged by the Government, as were the statutes themselves.

If the word "policy" is used loosely as considerations or reasons, there were various "policies" or reasons which favored boundary or exchange agreements. These promoted development and man-made change of tidelands to accommodate the needs of man (recreational, land control, certainty of boundaries, etc.). They then promoted man-made recreational boatways (while yielding royalty as compensation for the sand removed) and supported the permanent fixing of tidelands boundaries of adjacent owners.

ual foundation" before admitting the opinion evidence. He made his own preliminary determination that the then applicable California law and the pertinent facts and reasons made the prospects of these agreements legally available and factually practicable to achieve.

In ruling the opinion evidence admissible, the trial judge in effect held that the California law made these procedures and transactions available,[20] ignoring the condemnation project, and that any state purpose to keep the tidelands in their natural state were then not sufficient to prohibit these limited and mutually beneficial agreements on the particular facts and circumstances of this case. The trial court obviously determined there was no single dominant State tidelands "policy", nor was there any other reason which would preclude as a matter of law the achievement of these types of agreement. In the context of weighing the expert opinion, factually many reasons existed and were considered as they would be in the market place. And the jury was permitted to hear the opinions and weigh these reasons and factors. There is substantial evidence to support their

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[20]The trial judge heard arguments in chambers on the applicable law. He considered the applicable statutes, policies and procedures (including a published opinion of the California Attorney General interpreting these laws).

There were (and are) State statutes which authorize land exchanges (California Public Resources Code, Section 6307) and boundary line agreements (California Public Resource Code, Section 6357). These statutes are supported by various benefits to the State. They help the State to identify and permanently fix boundaries of State lands, to promote recreational boating, to promote navigation and commerce, inter alia. The evidence was to the effect that the State favored these transactions.

verdict and the judgment. This procedure was in accord with standard trial procedure.[21]

The trial judge also determined that there was an ample foundation in fact for the prospect of an agreement. He heard the witnesses' qualifications.[22] He determined there were sufficient foundational facts for their opinions.[23]

We submit a substantial preponderance of the evidence reflected that a reasonable probability existed favoring an exchange of lands and the availability of dredging on the date of taking.

As the Court of Appeals correctly observed, "The trial court in its discretion, properly decided the witnesses were competent to testify and apparently found that a *sufficient foundation had been shown for such testimony.*" (emphasis ours)[24]

The government argues (Petition, page 12) that "the question of what State policy was prior to the Federal project on use of State wetlands was a collateral matter to be determined by the trial judge."

If one substitutes the words "preliminary" for "collateral" and "statutes and goals were" for "pol-

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[21]For example see *United States v. Meadowbrook*, 259 F.2d 41, 45 (C.A.2d, 1958), (Reasonable possibility of zoning change). See also, *United States v. Delano Park*, 146 F.2d 473, 474 (C.A.2d, 1944). (Trier of fact may consider policies during World War II tending to limit availability of building materials as affecting market value).

[22]See Statement of Case, *supra*.

[23]As to foundation facts, see Statement of Case, *supra*.

[24]Petition, Appendix "A", page 12a.

icy was" (as we show above), this is what the trial judge did do in the context of his ruling as to availability of state statutory procedures for an agreement, and in determining that factual foundation did exist for opinion evidence.

The procedure below (as to whether the judge or jury decided various matters) was consistent with *McCandless v. United States,* 298 U.S. 342 (1936) (reasonable probabilities evidence is admissible to the jury and is relevant to use and fair market value), and consistent with *Olson v. United States,* 292 U.S. 246, 255 (1934) (relevant to use, a foundation for such evidence opinion). Said rulings are not inconsistent with *United States v. Reynolds,* 397 U.S. 14 (1970) for the *trial court did determine the preliminary matters* (legal availability, factual foundation) required of it as a preliminary matter. This is analogous to the function of the trial judge prescribed in *Reynolds* (scope of project). Had he determined that there was no factual foundation or legally approved manner of accomplishing the agreements, the evidence would have been excluded, just as *Reynolds* holds that evidence as to use flowing from the project itself (when a property was within the scope of the project) should be excluded. Rather on the facts and laws applicable in this case he properly and preliminarily concluded there was a proper foundation, and he admitted the evidence. There were conflicting facts and reasons to be weighed. There is substantial evidence to support the jury's findings and the judgment.

4. Jury weighed opinions

Reynolds does not preclude *jury consideration* of evidence relating to market value. *Reynolds* is in harmony with *McCandless* and *Olson*. *Reynolds* holds the issue of market value is for the jury. *McCandless* and *Olson* hold evidence relevant to market value (combined use of lands) and relevant to use (adaptability) is admissible and for the trier of fact (jury) to weigh. If the jury must determine market value *(McCandless, supra)* and adaptability and use *(Olson, supra)*, then necessarily it must weigh evidence found relevant by the trial court.[25]

The record also shows the jury was not given the task of determining State tidelands policy, contrary to the Government's statement in its fourth question. The record refutes any inference to the contrary. After the court made its preliminary determination (competency, statutory availability, factual foundation, etc.), the witnesses testified as to their opinions, and evidence was considered concerning the facts and reasons tending to support or refute such opinions.[26] The jury then weighed the experts opinions as to reasonable probabilities in the light of reasons and facts given by the experts to support their opinions. The jury's function was quite normal.

The jury was given this evidence in the framework of what an informed buyer and seller would want

[25]See, e.g., *United States v. Waterhouse*, 132 F.2d 699 (C.A. 9, 1943) (evidence regarding uses is admissible and whether adaptability and probability affect market values is for the jury).

[26]An expert witness, when testifying in the form of an opinion, may also state the reasons for his opinion and the facts and matters upon which it is based.

to consider in the open market in determining fair market value. There is nothing in the record to indicate the jury did not carry out the trial judge's expressed instruction that these factors should be considered to the extent they would affect market value.

5. No procedural error; but if there was any the government invited it

This Court is likely not to consider this question because error, if any, was invited. It is the owner's position that this evidence was admissible as *relevant to market value*.

Assuming (purely arguendo) it is not admissible for either purpose, then any error (procedural or otherwise) was "invited error." The Government led the trial court to rule, over the objections of this owner[27] that the issues (size and dimensions) were for the jury. The opinion evidence of reasonable probabilities of an agreement and the factual founda-

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[27]The owner had moved for a court trial on all issues. Particularly the owner requested the trial *court* determine the size and dimensions of the condemned property (Hearing, April 29, 1969, RT 5, 33, 34). At the Government's urging, the District Court ruled those issues (size and dimensions) were for the *jury*. This naturally led the trial court to place the issues of use (adaptability and feasibility), which the issues of size and dimensions related to before the jury as well. Not that this is error, but if it is, the Government caused it. Thus the Government substantially contributed to this evidence being presented to the jury, by insisting the *issues* to which this evidence related (and which it was directed to rebut) be determined by the jury. Now for the first time in this case, the Government urges error in admitting for *jury* consideration probabilities evidence, and any evidence (such as State "policies") affecting such prospects in the market.

tion and reasons relating to it were evidence relevant to size tending to rebut or disprove the Government's contentions that size and dimensions militated against adaptability and use of the subject property for subdivision. Thus any error in admitting evidence (e.g. of State motivations, if any) which related to that issue was caused by the Government.

On this record, such would clearly be invited error, which will prevent this Court from reaching this question.

The Government cannot on the one hand insist that certain issues (size and dimensions relating to adaptability and use) go to the jury and then on the other argue that the jury must determine this issue in a partial vacuum, i.e., that the owner's evidence (which tends to rebut the Government's contentions to that issue) should not have been admissible or considered by the jury on those issues.

The Government has surely waived any objection to the procedure followed by the Court by inviting any error. A party may not complain of error of the trial court in submitting or not submitting a question to the jury when the party itself in the trial court *requested or suggested that* the question should be determined in another procedural manner. See: *Law v. United States*, 266 U.S. 494 (1925); *Pacific Indem. Co. v. McDonald*, 107 F.2d 446 (9th Cir. 1939); *Crockett v. United States*, 136 F.2d 11 (9th Cir. 1943); *Devine v. Zimmerman*, 133 F.2d 850, 852 (8th Cir. 1943); *Platt v. United States*, 163 F.2d 165, 168 (10th Cir. 1947).

When the parties rested, and before the verdict, this owner again moved that the court dismiss the jury and itself determine all issues including size, dimensions and probabilities evidence relating thereto. The government refused the court's suggestion to do so and again opposed the owner's motion to submit all matters to the trial judge for determination. The government insisted on the then pending jury verdict (RT 5161). Thus the government's present attack upon the judgment and jury's verdict is inconsistent with its position throughout the trial, which position invited any error complained of.

6. This evidence was insignificant and not necessary to support the judgment

The jury had independent evidence to support its verdict, i.e., the subject property could have been developed within itself, without reliance upon probabilities evidence.

Thus the jury obviously found in accordance with the owner's basic position that no exchange of lands or boundary line agreement was necessary. Compelling proof was that the adjacent portions of the sandspit had been developed without agreement, and the balance of the entire parcel, of which the subject taking was only a portion, contained ample fill to complete development. As to the issue of market value, this evidence was only one alternative manner by which to use the property which would be considered by a buyer and seller if size was substantially less than 200 acres, or if other sources of fill were not preferred.

7. **Summary**

The Government's Petition should be denied for several reasons, any one of which is compelling and standing alone will support denial.

First, the opinion of the Court of Appeals does not present this procedural question, i.e., the duty of the judge/jury, vis-a-vis evidence of "State policies" under *United States v. Reynolds,* 397 U.S. 14 (1970). The Government did not raise this point on appeal.

Second, if indeed any error occurred, it was clearly *invited error* induced and caused by the Government, over objections of this owner, when it led the trial court to submit issues to this jury to which this evidence was relevant.

Third, the judgment is *valid on the record* (the record does not present this question for decision). Applicable procedural and substantive precedent approve the procedure which was followed. The error the Government now describes is predicated on a fictitious record, not this trial record. This record will reveal that the jury did not *"determine State tidelands policy",* it decided market value; it merely considered *evidence* relevant to market value (including the prospects of "State *policies")* in weighing opinion evidence of reasonable probabilities of an agreement, which opinion and agreement were relevant to market value; nor did the trial judge fail to consider and decide relevant matters of State law (or "policies"). By ruling this evidence admissible after hearing these same objections the trial judge decided (a) that State law did make available and (b) a

factual foundation did exist for the reasonable likelihood of said agreements being achieved in the near future.

Last, the jury had evidence of alternatives which would not (and did not) at all require any reliance upon this evidence, which was relatively insignificant evidence in a three-month trial. This alternative evidence *independently supports* the judgment.

The only questions presented as to these evidentiary issues are whether (1) the District Court *abused its discretion* in (a) admitting subdivision data, factual evidence of what was in fact happening, as relevant to "market value" of this subdivision in the market, and (b) in admitting opinion evidence of probabilities of an agreement with the State and the facts and reasons supporting the opinions; and (2) whether there was substantial evidence to support the judgment.

It is respectfully submitted that these evidentiary points are not matters upon which this Court should grant a writ of certiorari.

We also respectfully suggest that this Court need not review findings concurred in by two courts below and supported by substantial evidence, the admissibility of which was in the sound discretion of the District Court.

CONCLUSION

For the reasons stated, we respectfully suggest the government's Petition for Certiorari be denied.

Dated, Burlingame, California,
June 11, 1973.

Respectfully submitted,
JESS S. JACKSON, JR.,
RONALD J. MULCARE,
Attorneys for Respondent.

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Supreme Court, U.S.
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MICHAEL RODAK, JR.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1494

UNITED STATES OF AMERICA, *Petitioner*

vs.

100 ACRES IN MARIN COUNTY, CALIFORNIA
DRAKE'S BEACH ESTATES, INC., *Respondent*

BRIEF OF DRAKE'S BEACH ESTATES IN OPPOSITION TO THE AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY THE UNITED STATES OF AMERICA

JESS S. JACKSON, JR.,
RONALD J. MULCARE,
180 Park Road,
Post Office Box 709,
Burlingame, California 94010,
Attorneys for Respondent.

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STATEMENT OF THE CASE

In the State of California's Amicus Curiae brief,[1] purportedly in support of the Petition for Writ of Certiorari filed by the plaintiff United States, the State urges this Court to consider certain questions.

(State's Amicus Curiae brief, pages 2 and 3). These questions have not been raised by either the United States or defendant Drake's Beach Estates, the only two parties involved in this proceeding.[2]

The questions framed by the State of California are essentially evidentiary. In presenting its questions the State ignores the record and a multitude of pertinent facts. For this reason, the following summary of facts attempts to highlight the more important points in the record not set forth by the State in its statement of the case.

The owner presented evidence that there were four alternative plans for development of the subject property. All four of these alternatives were presented to the jury. Only one of them related to the availability of some type of cooperation or agreement between Drake's Beach Estates and the California State Lands Commission.[3]

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[1]On January 29, 1964, the State of California filed its disclaimer of any interest in this action. (Findings of Fact, App. A of Petition, page 26a; CT 44). Thus the State voluntarily withdrew itself as an active party from this case.

[2]The question presented by the United States is whether questions of State policy should be tried by the trial judge or the jury. *United States v. Reynolds*, 397 U.S. 14 (1970). The United States does not take the position, as does the State, that such matters are precluded from consideration in an eminent domain case. (Petition, page 3).

[3]The owner's basic position was that its property consisted of 212 acres, and State cooperation on any subject would not be required. (RT 1601-1606, 1630-1631, 1999-2000, 2121).

There is also evidence that even if the property was as little as 148 acres, as urged by Government, it could still be developed without State cooperation.

Drake's Beach Estates also presented evidence that ample fill material was available from at least two sources other than the dredging of State lands. (RT 1637-1642, 1739).

The jury's verdict and the judgment in this case need not be based upon any evidence elicited through the testimony of Mr. Nadey, a State employee. The judgment can be founded upon other considerations.

As to only one of these four plans did the owner offer evidence of a reasonable probability of an agreement with the State and that such an agreement was beneficial and logical for both the State and the owner. As of the date of taking in this case, October 23, 1963, ecological considerations were not in vogue and were not a primary consideration by the State Lands Commission. The primary State considerations in 1963 favored man-made recreational uses. The State of California Department of Fish and Game in January of 1963 took the position that these tidelands had ". . . little value for clams and oysters . . . ." (RT 3567) The State Lands Commission was more concerned with aiding navigation, including recreational boating, and commerce. The evidence in this case shows that the dredging of the State's channel would have improved recreational boatways, and at the same time, permitted royalties to the State for the soil removed. (RT 2038-2039).

Evidence of State policy and the reasonable probability of such availability of State owned tidelands for use in conjunction with the Drake's Beach Estates' property was presented through certain documentary evidence and several witnesses. Mr. Nadey was not the sole witness who testified regarding these matters.

The evidence of reasonable probability was admissible on several grounds: (1) It was relevant to market value as a factor an informed buyer and seller would consider; (2) It was relevant to refute the Government's contention that the propertys' size and dimensions precluded its adaptability to its highest and best use and thereby its market value; (3) It was relevant to feasibility of such use as it relates to market value.

In this case, Drake's Beach Estates presented substantial evidence showing that in all likelihood the State would enter some type of mutually beneficial cooperation agreement.

As foundation for this opinion the evidence in this case shows: the State's motivation for entering such agreements (RT 1982, 1993-1994, 2042-2043); the nature of the rights and the manner in which they were to be secured (RT 1976, 1980, 1984-1987, 2025, 2116); the nature of the work to be performed (RT 1621); the legal and practical availability of an agreement (RT 1973-1974, 2025); examples of and frequency of approval by the State of seventy similar transactions (RT 1988-1993, 1635); the cost and feasibility of development under an agreement (RT 1431, 1542, 1553, 1560); cost of other alternative methods of development (RT 1430-1432, 1637-1642, 1726-1731, 1739); as well as the reasonable probabilities of State consent to such an agreement being obtained (RT 1356, 1621, 2027, 2033, 2036-2038, 2094).

The testimony of Mr. Nadey was calculated to focus upon the reasonable probability of the State's entering

some type of cooperative agreement with Drake's Beach Estates for the benefit of both the State and Drake's Beach Estates. It was never proposed that Mr. Nadey's testimony would bind the State or the jury in its deliberations. It was merely some additional evidence bearing upon size, adaptability and market value. The testimony was not presented to the jury in such a fashion that it was compelled to conclude that an agreement would be reached between Drake's Beach Estates and the State. The evidence merely presented to the jury another reasonable consideration which a buyer and seller in the open market would weigh when purchasing and selling the subject property.

It seems only fair that this Court should be apprised of the fact that the State through its Attorney General was present at trial during the testimony of Mr. Nadey. The Court invited the State's attorney to participate in the trial. However, the State chose not to participate and object to the testimony of Mr. Nadey regarding State considerations in 1961 through 1963 on any basis, much less the basis now raised, that one State paramount consideration made dredge, fill, boundary line agreements or exchange agreements unavailable. Nor could they. Specific State law authorized them and Mr. Nadey, based on his own experience in administering these laws, stated his opinion as to how they would be applied by the State as they might affect the subject property. The only objections urged by the State were preliminary objections, one based upon privilege and the other based upon the compe-

tency of the witness. These are obviously matters for the trial court's determination.

ARGUMENT

Having disclaimed (CT 44) and having refused to participate at trial the State should be deemed to have waived any right to appear at all.

The State is not a party. Thus the State may not raise issues different from or new, relative to the questions raised by the parties.

We therefore have no reason, nor has the Supreme Court, to consider a point made in an Amicus Curiae Brief but not advanced in argument by the petitioner. *Knetsch v. United States,* 364 U.S. 361 (1960). An Amicus Curiae may not introduce new questions; only the questions presented by the parties may be considered. See also: *Dawes v. Silberman,* 185 Misc. 335, 56 N.Y. Supp. 2d 902; *State, by Clark v. Applebaums Food etc.,* 259 Minn. 209, 106 N.W. 2d 896; *Keating v. State* (Fla. App.) 157 S.2d 567; *Gem Stores Inc. v. O'Brien,* 374 S.W.2d 109.

Furthermore, the questions the State attempts to raise are very narrow matters dealing with evidence having to do with State of California statutes and local laws. They have no nationwide or constitutional significance and do not deal with federal questions, but rather with local matters.

BOUNDARY LINE AGREEMENTS AVAILABLE

The State *concedes* its first point by admitting the State is authorized to enter into boundary line contracts, under California Public Resources Code, Section 6357, particularly where artificial conditions were present. Also, there was testimony that in practice the State interpreted this section to authorize agreements where artificial conditions were threatened but had not yet occurred.

Whether the State tidelands boundaries were in a state of nature or whether this owner could have caused artificial conditions, or whether but for this action they would have been in 1963 but for the effects of this project in 1962, are *questions of fact* on which there was *substantial evidence* to support the owners position.

Nor does Finding 15 preclude this evidence. Finding 15 deals with and relates to *title*. Conclusive against these State arguments, in no way does Finding 15 deal with the prospect in 1963 of future artificial changes, nor with hypothetical circumstances in 1963 had not the Government's project stopped the subdivision in 1962.

As to "straightening" a boundary, the record shows the parties were merely using an expression of convenience. What was meant by this term was an "exchange" of areas, equivalent in value resulting in a "straightening" of a meandering shoreline boundary.

The distinction between an artificial or a natural state of a tidelands boundary is not necessary to support the judgment. If either an exchange agreement

or a boundary line agreement was available, the State's position fails.

EXCHANGE AGREEMENT AVAILABLE

The State also concedes that as a matter of local law, the State is authorized to enter into exchange agreements. Thus the State concedes its second point.

Without authority, the State argues that an exchange can occur only under "stringent conditions." On the record, the evidence is to the contrary. The numerous transactions, the frequency of state approval of dredging of other similar tidelands, the agreements and practices of the State in 1961-63 all disprove the State's contentions.

All the law, including the recent case of *Marks v. Whitney,* 6 C.3d 251 (1971) establish that the State can exchange its tidelands.

PUBLIC TRUST CONCEPT NOT CONTROLLING

In the face of clear statutory authority and expert testimony (from its own expert and others), the State illogically contends that the public trust as to State tidelands ("not to permit impairment of navigation, commerce or fishery", State's Amicus Curiae brief, page 7) would have operated to prevent dredging.

The record shows that the Public Trust concept was not limiting a factor in the various tidelands transactions described in the record.

This is evidenced by the high number of these types of boundary line and exchange agreements throughout the San Francisco Bay Area and along this portion of the California coast. These are concrete facts, not vague generalizations as to considerations erroneously labled by the State as "policies".

On its face, dredging to improve navigation is not inconsistent with the public trust not to impair navigation. That it was not considered inconsistent is apparent from the State's agreements and activities during that time.

RELEVANT AND ADMISSIBLE EVIDENCE

Of course, what is pertinent here is that opinion evidence as to reasonable probabilities of an exchange or other agreement with the State is relevant and admissible for the jury to consider in determining market value and use. *McCandless v. United States,* 298 U.S. 342 (1936); *United States v. Waterhouse,* 132 F.2d 699 (C.A. 9, 1943), affd, 321 U.S. 743 (1944); *Olson v. United States,* 292 U.S. 246, 255 (1934). Such evidence was further relevant to refute the United State's contention that the property was not adaptable. Since there was ample evidence that the subject property could be developed in several ways which did not rely on reasonable probabilities evidence at all, the judgment is fully supported without this evidence.

The trial judge determined that there was an ample foundation in law and fact for the prospects of an agreement. He heard the witnesses' qualifications. He

determined there were sufficient foundational facts for their opinions.

The jury was given this opinion evidence in the framework of what an informed buyer and seller would want to consider in the open market in determining fair market value. The witnesses testified as to their opinions, and evidence was considered in the light of the facts and reasons tending to support or refute such opinions. There is nothing in the record to indicate the jury did not carry out the trial judge's express instruction that these factors should be considered to the extent they would affect market value.

The weight of specific evidence (e.g. the existence of cancellable clam, oyster and eel grass allocations and preserves) as contrasted to the weight of other evidence (State admission that areas to be dredged were of little value for clams and oysters) is argument for the jury.

That ecological concerns were "vital" in 1963 is clearly unsupported in the record. Such an argument properly goes to the weight, not admissibility, of evidence.

The State takes the position in its Amicus Curiae brief that Mr. Nadey was a minor staff member of the State Lands Commission, with little authority. However, the record in this case shows Mr. Nadey was certainly qualified to testify regarding State policies and procedures in this area.[4]

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[4]Mr. Nadey was the only State employee in northern California at that time making recommendations as to boundary line agreements and dredging permits. (RT 2036). The Lands Commission

The qualifications required of an expert before he may give an opinion is a question for the trial judge and his decision thereon is conclusive, unless clearly erroneous as a matter of law. *St. Joe Paper Co. v. United States,* 155 F.2d 93, 96 (CA 5, 1946). In this case the Court of Appeals accurately observed that:

> "The trial court, in its discretion, properly decided the witnesses were competent to testify and apparently found that a sufficient foundation had been shown for such [opinion] testimony." (Petition, App. A, page 12a).

The Court of Appeals has found there was *substantial evidence* to support this judgment.

SUMMARY

The State concedes its entire position when it admits the boundary and exchange agreements are permitted under California law. Beyond this, the State's arguments invade the discretion of the trial court to determine the admissibility of evidence and the province of the jury to weigh the evidence. There was substantial evidence on all the factual points raised by the State.

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had rarely (if ever) failed to accept his recommendations on boundary line agreements. (RT 2037). He was familiar with the subject property (RT 1974-1975) and, in fact, he had reviewed a dredging application on an adjacent lagoon. (RT 1995-2001). He was also the draftsman of certain State of California statutes and procedures regarding tidelands, filling and related matters. (RT 1987).

CONCLUSION

Drake's Beach Estates respectfully requests that the Petition for Writ of Certiorari requested by the United States of America be denied.

Dated, San Francisco, California,
June 11, 1973.

JESS S. JACKSON, JR.,
RONALD J. MULCARE,
Attorneys for Respondent.